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**Independence and
Accountability of the Director of
Public Prosecutions: A
Comparative Survey**

by

Rowena Johns

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Rowena Johns

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EXECUTIVE SUMMARY

This paper outlines the powers of the Director of Public Prosecutions (DPP) and, where applicable, the internal or external bodies advising or supervising the Director in each jurisdiction in Australia and in the United Kingdom. At present, no DPP in Australia is oversighted by a specific Parliamentary Committee on the DPP or has a management board consisting of a majority of members from outside the DPP. The paper examines these concepts, which were raised in New South Wales in early 2001 when the Attorney-General's Department drafted plans for a Public Prosecutions Management Board and the Shadow Attorney-General introduced legislation for a Parliamentary Joint Committee on the DPP.

- The decision to prosecute reflects the delicate balance between independence and accountability and is governed in New South Wales by the DPP's Prosecution Policy and Guidelines (pages 2-5).
- The Office of the DPP in New South Wales has the largest caseload, staff and budget in Australia. The Director's appointment and tenure parallel that of a Supreme Court Judge. The main purpose of the Director is to prosecute serious criminal offences against State law. The *Director of Public Prosecutions Act 1986* (NSW) enables the Attorney-General to exercise the same functions as the Director in commencing or discontinuing prosecutions, and to issue directions to the Director on general aspects of the Director's activities, but in practice the Attorney-General has never 'overruled' the Director. Committees within the DPP which contribute to the efficiency of operations include the Management Committee, Executive Board and Internal Audit Committee (pages 5-14).
- In February 2001, the media reported that the Attorney-General's Department was devising a proposal for a Public Prosecutions Management Board (PPMB), to advise the Director on administrative and financial matters. The Attorney-General emphasised that the PPMB would not have the ability to intervene in the DPP's legal determinations and that the inclusion of the Police Commissioner on the PPMB was unlikely. The other projected members of the PPMB were the Director, the Solicitor for Public Prosecutions, the Director-General of the Attorney-General's Department, and another person recommended by the Attorney-General. The concept of a management board was apparently prompted by the review of the Office of the DPP by the Council on the Cost of Government in 1998 (pages 14-20).
- In April 2001, the Shadow Attorney-General introduced the *Director of Public Prosecutions Amendment (Parliamentary Joint Committee) Bill 2001* which revives previous Coalition attempts to establish a Parliamentary Joint Committee on the DPP. The main powers of the Committee are to recommend the amount of the annual budget for the DPP, review the exercise of the Director's functions, and approve the appointment of a Director. The Committee would be able to require the Director to furnish reasons for declining to prosecute or appeal a particular case, exceeding earlier versions of the proposal (pages 20-27).

- The Parliamentary Committees that oversee the Ombudsman and the Independent Commission Against Corruption have a narrower scope than that outlined by the *DPP Amendment (Parliamentary Joint Committee) Bill 2001*. The legislation governing the Committees on the Ombudsman and ICAC does not contain an explicit power of financial supervision and emphasises that the Committees are not authorised to reconsider specific cases (pages 27-29).
- The broad terms of reference of several Standing Committees of the New South Wales Parliament would allow them to report on aspects of the DPP's operations. For example, General Purpose Standing Committee No.3 and the Law and Justice Committee, both of the Legislative Council, can examine matters within the portfolio of the Attorney-General. Similar committees exist in other States but this paper does not attempt to cover them (pages 30-32).
- In 1982, Victoria was the first jurisdiction in Australia to enact legislation for the establishment of a DPP. The Director's independence was reduced in 1994 when the original Act was repealed. Under the *Public Prosecutions Act 1994 (Vic)*, the Director is required to consult with a Director's Committee when making a 'special decision', such as not to continue a prosecution. Another prescribed internal body is the Committee for Public Prosecutions, which is the only DPP board in Australia to include a participant who may be from outside the criminal justice system. Its activities range from recommending the removal of a Crown Prosecutor, to advising on the efficiency of the prosecutorial system (pages 32-43).
- Queensland's DPP was instituted by the *Director of Public Prosecutions Act 1984 (Qld)*. The Act allows the Director to conduct both indictable and summary prosecutions but, as in most Australian jurisdictions, the police handle the latter. The Director's supervision of legal decisions is clearly distinct from the Executive Director's control of finances and administration. There is no formal managerial committee (pages 43-44).
- In South Australia, the *Director of Public Prosecutions Act 1991 (SA)* grants the Director full prosecutorial powers, although in practice the Director focuses on indictable offences. There are two internal advisory committees: the Executive Committee deals with policy and legal issues, and the Management Committee is responsible for operational matters (pages 45-47).
- Western Australia's DPP was established by the *Director of Public Prosecutions Act 1991 (WA)*, which does not make provision for the carriage of summary prosecutions. Two internal bodies contribute to the efficiency of management and office practices, the Corporate Executive and the Operations Committee (pages 47-49).
- The Tasmanian DPP represents the State in civil litigation in addition to criminal proceedings for indictable offences. It does not have any formal internal committees (pages 50-51).

- The DPPs in the Australian Capital Territory and the Northern Territory have wider jurisdiction than the States as they preside over summary prosecutions. The ACT DPP has a Management Committee with an operational emphasis, while the NT DPP's Executive Committee is unique in including among its members two senior police officers. However, this reflects a cooperative arrangement for conducting summary prosecutions, rather than the involvement of 'external' participants (pages 51-55).
- Since 1984, the Commonwealth DPP has prosecuted indictable and summary offences against Commonwealth law. A Senior Management Committee is located in Sydney, Melbourne and Brisbane to assist the Deputy Director supervising each of those offices. Formal conferences among all the Deputy Directors from Canberra and the regional branches are held twice a year. The Commonwealth and the ACT are the only jurisdictions in Australia in which the legislation expressly authorises the Director to issue guidelines to the police and others on particular cases. The Commonwealth legislation, unlike any other in Australia, allows the Attorney-General to supply case-specific guidelines to the Director (pages 55-57).
- There is no Commonwealth Parliamentary Committee exclusively concerned with the Commonwealth DPP, but the Legal and Constitutional Legislation Committee in the Senate, and the Legal and Constitutional Affairs Committee in the House of Representatives have the prerogative to examine aspects of the DPP's activities (pages 57-58).
- In the United Kingdom, the *Prosecution of Offences Act 1985* (UK) established the Director of Public Prosecutions as head of the Crown Prosecution Service (CPS), although a public prosecutor had existed previously in a limited capacity. The CPS covers the whole of England and Wales and prosecutes both indictable and summary offences. Advisory mechanisms such as the Director's Board and the CPS Board handle legal and operational matters and resemble those found in most DPP offices in Australia. Business management is provided nationally by the Chief Executive and at a regional level by Area Business Managers. The CPS Inspectorate, a closely related but separate body with an independent statutory basis, carries out inspections of CPS offices. Furthermore, the Director is answerable to the Home Affairs Committee, a Select Committee of the House of Commons (pages 59-66).

1. INTRODUCTION

The Office of the Director of Public Prosecutions was created in New South Wales by the *Director of Public Prosecutions Act 1986* (NSW) and commenced operations in 1987. The main purpose of the Office is to prosecute indictable offences and related proceedings.¹ Every jurisdiction in Australia has a statutorily-appointed Director of Public Prosecutions (DPP), starting with Victoria in 1982. Although there are variations between functions and powers in different parts of Australia, the philosophy behind the role is the same: to invest the responsibility for the prosecution of serious criminal offences in a politically independent individual, rather than the Attorney-General of the Government in power. However, the Attorney-General shares some of the prosecutorial capacities of the Director, can issue directions in relation to the performance of the Director's functions, and is ultimately responsible to Parliament for the criminal justice system. The independent status of the Director reflects the principle of the separation of powers between the executive, parliament and the judiciary, a crucial doctrine of the Westminster system of government.

The discretion which the Director exercises in making determinations can provoke criticism from politicians, the media and the public. This occurred in New South Wales on several occasions in 2000 and 2001, especially in response to the refusal of the Director, Nicholas Cowdery QC, to prosecute or appeal in certain cases. In recent years, financial tension has also persisted between the Director and the Government. The Director has complained of insufficient funding,² while the Government and the

¹ **Indictable offences** are serious crimes for which the accused possesses an initial right to stand trial. Most indictable offences in New South Wales appear in the *Crimes Act 1900* and the *Drug Misuse and Trafficking Act 1985*. An indictment is the document which sets out the offence or offences alleged to have been committed by the accused and is presented at court. **Summary offences** are less serious crimes, including offences against the public order (found in the *Summary Offences Act 1988*) and driving offences (in the *Road Transport (Safety and Traffic Management) Act 1999*). They are prosecuted in the Local Court before a Magistrate by police prosecutors, not the DPP. Also note that the *Criminal Procedure Act 1986* provides for a variety of indictable offences to be dealt with summarily unless the prosecution and/or the accused elects to the contrary: Part 2, Division 3; and Tables 1 and 2 to Schedule 1. The Royal Commission into the New South Wales Police Service recommended that summary prosecutions be progressively transferred to the DPP, reasoning that it is more impartial and independent than the police: *Final Report of the Royal Commission into the New South Wales Police Service, Volume II: Reform*, 15 May 1997, pp 314-320 and Recommendation 64 at p 546. The DPP conducted pilot schemes in the second half of 1996 at Campbelltown and Dubbo Local Courts: Office of the DPP (NSW), *Annual Report 1996-1997*, pp 5, 51, 66-67. However, the Government has not proceeded further with the concept.

² For example, Mr Cowdery recently stated, 'With just a small increase in our budget (probably about 10 per cent, a mere drop from the Olympic bucket), prosecutors would have the time to look at matters in advance, to make sure the evidence is complete and notified fully and earlier to the defence, to discuss issues with the defence and see just what is in dispute, to refine the charges if necessary - all with the result of more pleas of guilty and shorter trials for those that do continue, confined to issues that are genuinely in dispute. If we could do that, there would be substantial long-term savings to the system as a whole, a higher level of professional service and a good deal lower

Opposition have expressed concerns over the budgetary and administrative control of the DPP's Office. The Council on the Cost of Government encapsulated both perspectives in its review of the Office in late 1998, by suggesting managerial reforms and yet finding substantial resource deficiencies.

The independence of the DPP is not unlimited. Although no Parliament in Australia has a Committee on the DPP, there are numerous Standing Committees which can examine organisations within the Attorney-General's portfolio. The accountability of the Director to the Attorney-General, and therefore to Parliament, is reinforced by the legislation establishing each DPP. Most of the Directors are also informed by internal committees which may review, evaluate and plan issues of a legal, policy and operational nature, to varying degrees depending on the jurisdiction.

Earlier this year in New South Wales, two proposals for greater external supervision of the DPP emerged. In February 2001 the Attorney-General confirmed that the Government was considering the concept of a Public Prosecutions Management Board, to improve financial and administrative efficiency. According to the draft plan, the majority of the Board members would be from outside the DPP. In April 2001 the Shadow Attorney-General introduced the *Director of Public Prosecutions Amendment (Parliamentary Joint Committee) Bill 2001*, which seeks to create a Committee on the Office of the DPP to monitor funding, review the exercise of the Director's functions and make recommendations for change. The Committee parallels those overseeing the Ombudsman and the Independent Commission Against Corruption, and also draws inspiration from the Home Affairs Committee of the House of Commons in the United Kingdom.

(The information in this paper is current at 10 July 2001.)

2. PROSECUTORIAL PRINCIPLES

The role of the public prosecutor is to assist the court to arrive at the truth, not to push for a conviction. The prosecutor does not represent a particular client. Rather, he or she serves the community and, in doing so, must act in a spirit of fairness.³

Independence is a crucial attribute of a prosecutor. The International Association of Prosecutors has declared: 'The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.'⁴ In *Price v Ferris* (1994) 34 NSWLR 704, Kirby P, in the New South

level of stress for all involved.' N Cowdery QC, *Getting Justice Wrong: Myths, Media and Crime*, Allen & Unwin, 2001, pp 144-145. Mr Cowdery also referred to funding constraints in his 'Director's Overview' in recent *Annual Reports: 1998-1999*, p 5; 1997-1998 p 5.

³ Office of the DPP (NSW), *Prosecution Policy and Guidelines*, issued March 1998, Policy 1 at p 1 and Guideline 1 at p 11. This document is available in electronic form on the DPP website at <<http://www.odpp.nsw.gov.au>>

⁴ International Association of Prosecutors, *Standards of Professional Responsibility and*

Wales Court of Appeal, stated (at 707):

What is the object of having a Director of Public Prosecutions? Obviously, it is to ensure a high degree of independence in the vital task of making prosecution decisions and exercising prosecution discretions.

Decision to prosecute

The decision to prosecute is primarily a question of public interest. According to Nicholas Cowdery QC, the current Director of Public Prosecutions in New South Wales:

The public interest is not to be equated with political pressure; even less is it to be gauged from current popular clamour. What is of public interest is a different question from what is in the public interest.⁵

The DPP Prosecution Policy in New South Wales outlines three issues to be assessed to resolve whether the public interest requires a person to be prosecuted:

- whether or not the admissible evidence available is capable of establishing each element of the offence;
- whether or not it can be said that there is no reasonable prospect of conviction by a reasonable jury properly instructed and, if not;
- whether or not discretionary factors nevertheless dictate that the matter should not proceed in the public interest.

Discretionary factors include the seriousness and recency of the alleged offence, the likely length and expense of a trial, any mitigating or aggravating circumstances, the alleged offender's age, health or other relevant subjective features, and their degree of culpability in the offence.

A decision to prosecute must not be influenced by:

- the race, religion, political beliefs and other characteristics of the alleged offender unless they have special significance to the commission of the offence;
- the personal feelings of the prosecutor;

Statement of the Essential Duties and Rights of Prosecutors, adopted on 23 April 1999, at 2.1. The Association was established in June 1995 and was formally inaugurated in September 1996. The NSW DPP is a member.

⁵ N Cowdery QC, 'The DPP's Decision to Prosecute', speech given at Bar Practice Course 2001. A copy of the speech can be obtained from the DPP website at <www.odpp.nsw.gov.au/speeches>

- possible political advantage or disadvantage to the government or any political party, group or individual;
- the possible effect of the decision on the personal or professional circumstances of those involved in the prosecution.⁶

Decision to appeal

The Director has no power to appeal against the acquittal of a defendant at trial, although an appeal may be lodged against an order or ruling made by a judge during a trial.⁷ Therefore, the main type of Crown appeal is against an allegedly inadequate sentence.

Controversy has been generated in numerous cases by the Director's refusal to appeal a sentence imposed. Special considerations are taken into account by the Director in deciding whether to direct such an appeal:⁸

- whether or not the sentencer made a material error of law or fact, misunderstood or misapplied sentencing principles, or wrongly assessed or omitted to consider some salient feature of the evidence;
- whether an error of principle is implied by the apparent manifest inadequacy of the sentence;
- the sentencing range, according to official statistics and comparable cases;
- the conduct of the proceedings at first instance;
- the principle of double jeopardy;⁹ and/or
- the appellate court's residual discretion not to intervene even if it considers the sentence to be too lenient.

⁶ Office of the DPP (NSW), n 3, Policy 5 at pp 3-6.

⁷ This category of appeal is commonly referred to as an 'interlocutory appeal' and is authorised by s 5F of the *Criminal Appeal Act 1912*. A typical Crown submission in an interlocutory appeal is that the trial judge erred by ruling certain evidence inadmissible.

⁸ Office of the DPP (NSW), n 3, Policy 12 at pp 9-10, Guideline 25 at pp 25-26.

⁹ Double jeopardy is the prospect of convicting or punishing a defendant multiple times for the one offence. In the context of a Crown appeal against sentence, the principle of double jeopardy relates to the burden upon a sentenced person who must return to court after his or her matter appeared to be finalised, and face the prospect of being re-sentenced to a more severe punishment. When the Court of Criminal Appeal upholds a Crown appeal, it acknowledges that it has reduced the sentence that would otherwise be appropriate, to allow for double jeopardy.

Case law in the Court of Criminal Appeal (CCA) has established that the right of the Crown to appeal to the CCA, pursuant to s 5D of the *Criminal Appeal Act 1912*, should be exercised rarely,¹⁰ that the original sentence must be manifestly inadequate and that the CCA will not intervene merely because it would have imposed a more severe sentence.¹¹ The CCA's discretion to not intervene despite finding that a sentence is manifestly inadequate,¹² sharply distinguishes a Crown appeal from an appeal brought by a convicted person.

3. OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS (NSW)

3.1 General features and staff structure

The Director of Public Prosecutions (DPP) in New South Wales prosecutes indictable¹³ offences against State law, including murder, manslaughter, assault, wounding, sexual assault, robbery, fraud and drug offences. The proceedings conducted by its officers include trials in the District Court and Supreme Court, committals in the Local Court, and appeals in the District Court, Court of Criminal Appeal (part of the Supreme Court) and the High Court.¹⁴

The first Director, Reginald Blanch QC, now Chief Judge of the District Court, was appointed in 1987 during the Unsworth Labor Government's term of office. The current Director, Nicholas Cowdery QC, was appointed in 1994 while the Fahey Liberal Government was in power.

The total staff of the Office numbered 531 people at 30 June 2000.¹⁵ The majority of the staff are located in the head office in Sydney. Suburban branch offices of the DPP are located at Parramatta, Penrith and Campbelltown, and are collectively referred to as 'Sydney West'. There are also regional offices of the DPP at Bathurst, Dubbo, Gosford, Lismore, Newcastle, Wagga Wagga and Wollongong.

The Director and two Deputy Directors occupy the Director's Chambers with lawyers who are professional assistants. The Director and Deputy Directors are statutory appointees under the *Director of Public Prosecutions Act 1986*. The Crown Prosecutors

¹⁰ *Griffiths v R* (1977) 137 CLR 293; *Everett v R* (1994) 181 CLR 295; *R v Allpass* (1994) 72 A Crim R 561.

¹¹ *R v Hallocoglu* (1992) 29 NSWLR 67.

¹² *R v Holder* [1983] 3 NSWLR 245.

¹³ For an explanation of indictable and summary offences, see Footnote 1.

¹⁴ A committal is a hearing in the Local Court to determine whether there is a sufficient case against a person charged with an indictable offence to proceed to trial. The DPP took over the conduct of committal proceedings in 1990.

¹⁵ Office of the DPP (NSW), *Annual Report 1999-2000*, p 56.

act as counsel to the Director and are appointed under the *Crown Prosecutors Act*

Organisational Structure of the Office of the Director of Public Prosecutions in NSW

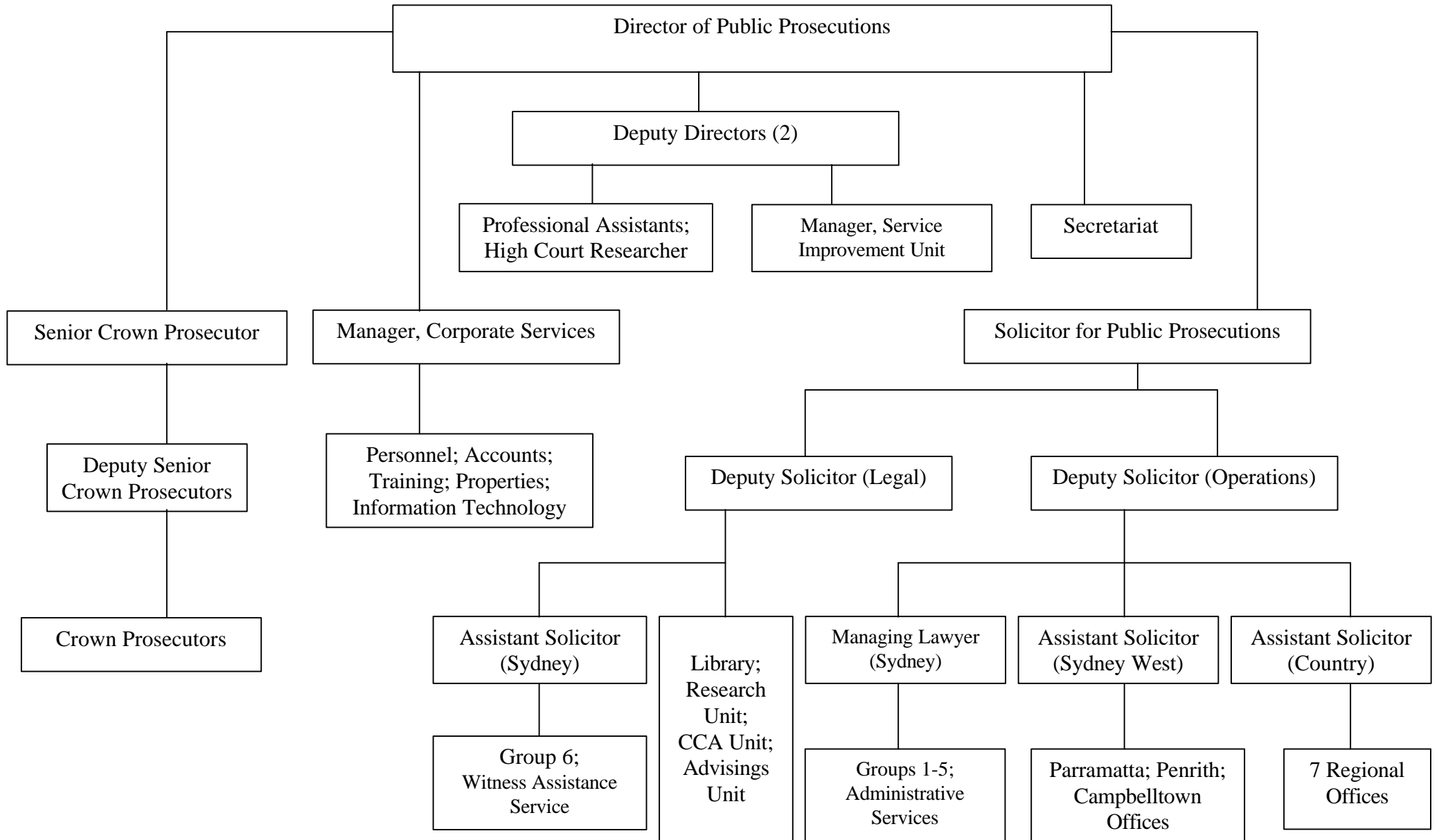


Table 1

1986.¹⁶ In Sydney head office, the Crown Prosecutors are located on distinct floors which serve as chambers. They are usually instructed in matters by solicitors. The Solicitor for Public Prosecutions, who is a statutory appointee under the *DPP Act*, is the head of the solicitors in the Office. He is assisted by the Deputy Solicitor (Legal), the Deputy Solicitor (Operations), the Assistant Solicitor (Sydney) and the Managing Lawyer (Sydney), all of whom are located in head office, and the regionally-based Assistant Solicitor (Sydney West) and Assistant Solicitor (Country).

The legal and support staff are divided into groups. Generally, Groups 1 to 4 deal with trials and associated proceedings in the District and Supreme Courts, and committals in the Local Court. Solicitors in Group 5 conduct 'short matters' such as appeals from the Local Court to the District Court against conviction and/or sentence, Supreme Court bail applications, and arraignments.¹⁷ Group 6 is a specialist unit that handles prosecutions against police, matters arising from the Police Royal Commission and other 'sensitive' cases. Additional specialist units include the Court of Criminal Appeal Unit, the Advising Unit, the Research Unit, the library, and the Witness Assistance Service. Groups 1-6 and the CCA Unit are each headed by a Managing Lawyer who allocates work, gives guidance to legal and support staff, approves a broad range of legal, procedural and administrative decisions of staff members, and participates in managing the budget for their unit. All solicitors are graded according to their duties and responsibilities, from Level 1 to Level 5.

The Sydney West and regional branch offices are also each headed by a Managing Lawyer. Those offices are not subdivided into units and the Crown Prosecutors work in a less segregated manner than their counterparts in head office.

3.2 Internal advisory and consultative mechanisms¹⁸

At present, the management of the DPP is facilitated by a Management Committee and a separate Executive Board.

The **Management Committee** was established in late 1994 and is comprised of:

¹⁶ All of the 80 Crown Prosecutors are barristers, although there is no necessity under the *Crown Prosecutors Act* for them to be. Section 4 merely requires that they be admitted as 'legal practitioners' in accordance with the *Legal Profession Act 1987*. Crown Prosecutors conduct trials in the Supreme and District Courts, appeals in the CCA and perform an assortment of other appearance and advice work. District Court trials of limited complexity are also conducted by trial advocates, who are senior solicitors.

¹⁷ An arraignment is the process by which the indictment stipulating the charges against the accused is read and the accused is asked how he or she pleads. If the accused pleads guilty, the matter proceeds to sentence; if the accused pleads not guilty, the matter proceeds to trial.

¹⁸ Information on the Management Committee, the Executive Board, and the Service Improvement Unit was obtained from personal communication with Martin Blackmore, Deputy Director, 15 June 2001; and from N Cowdery QC, *Media Release*, 15 February 2001, which is available on the DPP website at <<http://www.odpp.nsw.gov.au>>

- the members of the Executive Board (see below);
- Deputy Solicitor (Legal) for Public Prosecutions;
- Deputy Solicitor (Operations);
- Assistant Solicitor (Sydney);
- Assistant Solicitor (Sydney West);
- Assistant Solicitor (Country).

The Committee meets monthly. Its primary function is to serve as a forum for discussing operational and management issues, and for sharing information on the activities, challenges and initiatives of the various functional areas of the Office.

The **Executive Board** was established in December 1999, in response to the Council on the Cost of Government's review of the DPP in 1998: see discussion at 5.4 on p 19. It also meets monthly, or more frequently as required, and comprises:

- Director (Chair);
- the Senior Crown Prosecutor;
- Solicitor for Public Prosecutions;
- Manager, Corporate Services.

The Deputy Directors of Public Prosecutions attend by invitation. The Board addresses management performance and strategy, budgetary evaluation, progress on the Corporate Plan and change and improvement in the wider criminal justice system.

There is also a **Service Improvement Unit**, located in the Director's Chambers. It is responsible for reviewing the implementation of policies and procedures, to improve organisational performance and meet corporate objectives. The Unit consists of the Manager of the Unit, who reports to the Director, and additional staff seconded from across the Office depending on the reviews and projects being undertaken.

The **Internal Audit Committee** examines all areas of the Office's operations, addressing probity and accountability issues. The members are:

- one of the Deputy Directors (Chair);
- Solicitor for Public Prosecutions;
- the Senior Crown Prosecutor;
- Manager, Corporate Services;
- Manager, Service Improvement Unit.

Representatives of the Audit Office of New South Wales and of the internal audit provider attend meetings by invitation. The Committee establishes the audit plan for the forthcoming year, reviews audit reports, and monitors management responses to those reports. In 1999-2000 the Committee conducted internal audits on topics including staff salaries and recruitment processes.¹⁹

¹⁹ Office of the DPP (NSW), *Annual Report 1999-2000*, p 65.

The Solicitor's Executive is comprised of the Solicitor for Public Prosecutions, the Deputy Solicitor (Legal) for Public Prosecutions, Deputy Solicitor (Operations), Assistant Solicitor (Sydney), Assistant Solicitor (Sydney West) and Assistant Solicitor (Country). These officers consult regularly on an informal basis and meet usually once a month, after the meetings of the Management Committee and the Executive Board, to enable the Solicitor for Public Prosecutions to brief the Executive on any matters arising from those meetings. In addition, the Solicitor's Executive considers its own issues of an operational, administrative or legal nature.

Other networks of consultation occur within the Office, such as regular meetings of the Managing Lawyers of the Groups.

It should also be noted that the Director does not make determinations on a solitary or arbitrary basis. Usually a determination is prompted by a recommendation, submission, or report from a lawyer or a Crown Prosecutor. For example, a lawyer who believes that the sentence imposed in one of their cases was manifestly inadequate, can send a written submission to the Director requesting a Crown appeal. The matter is then considered by a professional assistant to the Director, and/or a Deputy Director, before being referred to the Director.

4. DIRECTOR OF PUBLIC PROSECUTIONS ACT 1986 (NSW)

The *Director of Public Prosecutions Act 1986* (NSW) received assent on 23 December 1986 and had commenced in its entirety by 13 July 1987.

Prior to the establishment of the DPP, the Attorney-General had responsibility for the decision to prosecute serious criminal offences. The powers of the Attorney-General included the power to determine that no bill of indictment be found against a person committed for trial; to direct no further proceedings against a person where a bill had been found; to commence proceedings for indictable offences in the District Court or Supreme Court by *ex officio* indictment (an indictment presented to a court without the defendant being committed for trial by a Magistrate); and to appeal to the CCA against the alleged leniency of a sentence passed in the District Court or Supreme Court.

Appointment of Director

The Director is appointed by the Governor, with no fixed period of appointment. Security of tenure was part of the original intention to make the position parallel to that of a Supreme Court Judge in terms of salary, allowances and political independence. As the Attorney-General stated in the Second Reading Speech of the *Director of Public Prosecutions Bill 1986*:

The high status of the director's position, and the security of tenure provided, will ensure that the director is freed from any suggestion or appearance that he or she is open to political pressure. There will be no reason to fear that the director may make decisions to curry favour with the

Government of the day, in order to secure reappointment or advancement.²⁰

A measure of parliamentary control over the appointment of the Director was introduced by the *Statutory Appointments Legislation (Parliamentary Veto) Amendment Act 1992*. The insertion of s 4A into the *DPP Act* precluded a person from being appointed as Director until the proposed appointment had been referred to the Committee on the Office of the Ombudsman. The Committee has 14 days to veto the appointment, or a further 30 days if it notifies the Minister within the initial 14 days that it needs more time: s 31BA of the *Ombudsman Act 1974*.

The Director shall be removed from office by the Governor on such grounds as bankruptcy, being absent from duty without leave, being nominated for election as a Member of Parliament, not disclosing pecuniary interests, or engaging in other employment without the consent of the Attorney-General. The Governor may remove the Director for incapacity, incompetence, misbehaviour (not defined), or conviction of an offence punishable by imprisonment for 12 months or more: cll 4-6 of Schedule 1 to the *DPP Act*.²¹

Powers and functions

The Director is the head of the Office of the Director of Public Prosecutions. Although the position is created by the *DPP Act* and is therefore not a Public Service position, the Director is categorised as equivalent to a departmental head under the *Public Sector Management Act 1988*, and is the financially responsible officer for the purposes of the *Public Finance and Audit Act 1983*.

By contrast, the Director in Victoria is distinct from the Office of Public Prosecutions, and the Solicitor for Public Prosecutions is the departmental head.

The Director is empowered by ss 7 and 8 of the *DPP Act* to institute and conduct a variety of proceedings including:

- prosecutions for indictable offences²² in the District Court and Supreme Court;
- appeals in which the Crown is appellant or respondent;
- committal proceedings for indictable offences;
- summary proceedings for indictable offences that may be dealt with summarily in the Local Court.²³

²⁰ The Hon. T Sheahan, *NSWPD(LA)*, 1 December 1986, p 7343.

²¹ These provisions apply to a 'Senior Officer', defined by cl 1 of Schedule 1 as the Director, a Deputy Director and the Solicitor for Public Prosecutions.

²² The Act defines an indictable offence as 'an offence (including a common law offence) that may be prosecuted on indictment': s 3(1). See Footnote 1 for further information on indictable offences.

²³ For an explanation of the distinction and yet overlap between indictable and summary offences, see Footnote 1. A summary offence is defined under s 3(1) as 'an offence

The Director and the Attorney-General have the same capacity to:

- find a bill of indictment for an indictable offence;
- determine that no bill be found;
- direct that no further proceedings be taken against a person who has been committed for trial or sentence: s 7(2).

Contrary to the situation in most other States, the Director in New South Wales is specifically prohibited from granting a witness an indemnity from prosecution, but may request the Attorney-General to do so: s 19.²⁴ The Prosecution Policy and Guidelines of the DPP outline principles and procedures for making a request for an immunity or undertaking.²⁵ The reasoning for leaving this power with the Attorney-General was explained in the following terms in the Second Reading Speech of the *DPP Bill 1986*:

At present indemnities are rarely given. That is a power that should be exercised with extreme caution, and only when it is in the public interest to do so. The interest of the prosecution in securing a conviction is only one of the matters that should be considered and, therefore, the power is to reside in the Attorney General.²⁶

There are restrictions upon the delegation of the Director's functions. Certain decisions, such as finding a bill when a person has not been committed for trial, and determining that no bill of indictment be found against a person committed for trial ('no billing' a matter) may only be delegated to a Deputy Director: s 33(2).

The Director may furnish guidelines to the Deputy Directors, the Solicitor for Public Prosecutions and the Crown Prosecutors with regard to the prosecution of offences, but not particular cases: s 13.

The Director may recommend to the Commissioner of Police, or any other person who investigates offences or conducts prosecutions, that proceedings be instigated in respect of any offence: s 14. The Director may also furnish guidelines to the Commissioner of Police in relation to the prosecution of indictable or summary offences, but only after

that is not an indictable offence.' Section 8 provides that the Director may institute and conduct summary proceedings in any court, where the offence is a 'prescribed summary offence' or the person otherwise responsible for the prosecution of the offence has consented in writing. The *Director of Public Prosecutions Regulation 2000* categorises all summary offences as prescribed summary offences, with an exception that is not relevant for present purposes. In practice, summary prosecutions are overwhelmingly conducted by police prosecutors from the Police Service, not the DPP.

²⁴ The Attorney-General's powers to grant indemnities and give undertakings are found at ss 46-47 of the *Criminal Procedure Act 1986*.

²⁵ Office of the DPP (NSW), n 3, Policy 10 at pp 8-9, Guideline 17 at pp 21-22.

²⁶ The Hon. T Sheahan, *NSWPD(LA)*, 1 December 1986, p 7343.

consultation with the Attorney-General and not on particular cases. The Director's powers to request information from the police are found under ss 16 and 18.

Relationship to Attorney-General

The Director is responsible to the Attorney-General for the due exercise of the Director's functions: s 4(3). However, nothing in s 4(3) affects or derogates from the authority of the Director with respect to the preparation, institution and conduct of any proceedings.

In the Second Reading Speech of the *DPP Bill 1986*, the Attorney-General, the Hon. T.W. Sheahan, highlighted the Director's independence and yet the importance of the Attorney-General retaining some responsibility for prosecutions:

It is crucial that the community has confidence in the way criminal justice is administered. It must not only be impartial, efficient and free from political and personal interference, but, as well, must be seen to be so.²⁷

...

It would defy the principles of responsible, democratic government if the Attorney General were to abdicate totally his responsibility for such an important area of government, in favour of a person who is not elected, and thus not answerable to Parliament or the community.

However, it is proper, in order to facilitate a more efficient and consistent prosecution policy, and to provide for what is perceived as a more independent decision-making process, that the Government should give authority to a person to exercise these powers on a day-to-day basis.²⁸

Section 25 places reciprocal duties upon the Director and the Attorney-General to consult at each other's request about the exercise of the Director's functions.

The Attorney-General may issue guidelines to the Director, for example, on the circumstances in which the Director should institute or carry on prosecutions, but not on specific cases: s 26.

The Attorney-General shall notify the Director whenever the Attorney-General finds a bill, determines that no bill be found, directs no further proceedings be taken, or appeals to the CCA against a sentence: s 27. Once the Attorney-General exercises such a function, the Director shall not exercise a function in an inconsistent manner without the consent of the Attorney-General: s 28.

Section 30 confirms that nothing in the Act affects any functions of the Attorney-General that the Attorney-General has apart from the Act.

²⁷ NSWPD(LA), 1 December 1986, p 7339.

²⁸ Ibid, p 7340.

There has been no occasion to date when the Attorney-General has ‘overruled’ a decision of the Director. Specifically, the Attorney-General has not issued a guideline under s 26 or exercised the powers under s 27.

Other relevant powers of the Attorney-General

Controversy has surrounded several occasions in 2000 and 2001 when the Director has declined to appeal against a sentence to the CCA. The power to initiate such an appeal is found in s 5D of the *Criminal Appeal Act 1912* and is shared by the Attorney-General.²⁹ Therefore, the Government can launch its own Crown appeal if it is sufficiently dissatisfied with the Director’s failure to do so.

The Attorney-General also has the power, pursuant to s 37 of the *Crimes (Sentencing Procedure) Act 1999* to request the Supreme Court to issue a guideline judgment for a particular type of criminal offence, but not a specific case. A guideline judgment nominates a sentencing range and/or principles to be applied by sentencing judges. The Government’s capacity to utilise this provision when frustrated by the determinations of the courts or the DPP was evident in the high profile case of Murray Hearne, who fatally stabbed Constable Peter Forsyth in 1998. When the CCA reduced Hearne’s sentence,³⁰ the Attorney-General contacted the DPP about the prospect of a High Court appeal. The Government also considered the issue of guideline judgments, as announced in Parliament by the Treasurer, the Hon. Michael Egan, on behalf of the Premier:

Mr Carr has asked the Attorney General, as a matter of priority, to ensure that a guideline sentence for assaults on police is sought from the Court of Criminal Appeal. This will provide greater consistency with the punishments meted out to people who would attack those who risk their lives to ensure the New South Wales community is protected from harm.

The Premier has also asked that the possibility of a guideline sentence for the heinous crime of murder be examined.³¹

Relationship to Deputy Director

One or more Deputy Directors may be appointed by the Governor, and the position is responsible to the Director: s 5. There are currently two Deputy Directors, Martin

²⁹ The wording of s 5D(1) is: ‘The Attorney-General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any sentence pronounced by the court of trial in any proceedings to which the Crown was a party and the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said court may seem proper.’

³⁰ Hearne pleaded guilty to murder and was sentenced in the Supreme Court in June 2000 to 27 years imprisonment with a non-parole period of 20 years. On 28 February 2001, the CCA reduced the sentence to 18 years with a non-parole period of 13 years.

³¹ *NSWPD(LC)*, 4 April 2001, p 48.

Blackmore (appointed 1997) and Roy Ellis (appointed 1999).

The role of a Deputy Director, pursuant to s 22(1), is to assist the Director as the Director requires. A Deputy Director possesses the same capacities as a Crown Prosecutor: s 22(2). In practical terms, the duties of the Deputy Directors include to provide advice to the Director and DPP lawyers, appear in the High Court and the CCA, review recommendations by Crown Prosecutors in relation to particular prosecutions, and perform the Director's duties as delegated. Section 33 precludes the Director from delegating the following powers except to a Deputy Director:

- determining that no bill of indictment be found when a person has been committed for trial;
- directing no further proceedings against a person who has been committed for trial or sentence;
- finding a bill of indictment when a person has not been committed for trial (an *ex officio* indictment);
- appealing to the CCA against a sentence.

Relationship to Solicitor for Public Prosecutions

Section 6 creates the Solicitor for Public Prosecutions and makes the position responsible to the Director: s 6(3).

The role of the Solicitor for Public Prosecutions is to perform the tasks of a solicitor for the Director in the exercise of the Director's functions, and to instruct the Crown Prosecutors and other counsel on behalf of the Director: s 23.

Relationship to Crown Prosecutors

The duties of the Crown Prosecutors often involve interaction with the Director, and are outlined by s 5 of the *Crown Prosecutors Act 1986*:

- to appear as counsel in proceedings on behalf of the Director;
- to find a bill of indictment;
- to advise the Director in respect of any matter referred for advice by the Director;
- to carry out such other functions of counsel as the Director approves.

The Director can furnish guidelines to Crown Prosecutors: s 11 of the *DPP Act*.

5. PUBLIC PROSECUTIONS MANAGEMENT BOARD PROPOSAL

In mid-February 2001, the media reported that a draft minute prepared for Cabinet by the Attorney-General's Department, proposed the formation of a new body, the Public Prosecutions Management Board (PPMB) to oversee the NSW DPP.

5.1 The PPMB's role

The functions of the PPMB were projected to include:

- taking over the role of the Management Committee and the Executive Board that operate internally within the DPP;
- overseeing many of the administrative and financial decisions made at the DPP;
- recommending the removal of a Crown Prosecutor.

The Attorney-General, the Hon. Bob Debus, emphasised that the PPMB ‘would oversee and guide the director on questions of financial management, administration, housekeeping, that sort of thing ... But in no sense would it be wishing to interfere with the legal, prosecutorial responsibilities of the DPP’.³² The PPMB would not have the power to prosecute or appeal in a specific case.

On the subject of resources, the Attorney-General said: ‘The DPP cannot define his freedom in terms of freedom to spend what he wants or to manage the disbursement of his personnel as if there are no sensible management principles that might be relevant.’³³

5.2 Membership of the PPMB

The members of the PPMB from within the DPP would be outweighed by external appointees. The members of the Committee, as originally reported were:

- Director of Public Prosecutions;
- Solicitor for Public Prosecutions;
- Director-General of the Attorney-General’s Department;
- another person recommended by the Attorney-General;
- Police Commissioner.

The Attorney-General announced his reservations about the Police Commissioner sitting on the PPMB. He explained that the Commissioner’s initial inclusion was because of the ‘massive amount of information exchanged between the DPP and the Police Department. However, I have already indicated, actually personally, to Mr Cowdery just in the last few days that I’m not actually particularly supportive of the idea of including the commissioner on that board’.³⁴

The proposed PPMB excludes the Senior Crown Prosecutor, currently Mark Tedeschi QC, who is on the present Management Committee, Executive Board and Internal Audit Committee.

5.3 Responses to the PPMB proposal

Among the reactions that were reported in the media to the concept of a management

³² ‘An independent DPP’, *Sydney Morning Herald*, 16 February 2001, p 12.

³³ ‘No room for Ryan on new DPP board’, *Sydney Morning Herald*, 16 February 2001, p 4.

³⁴ *Ibid.*

board were:

Chris Hartcher, Shadow Attorney-General

The Shadow Attorney-General, Mr Chris Hartcher, in the context of announcing the Opposition's alternative strategy to supervise the DPP by a Parliamentary Committee, criticised the Labor Government's approach as less democratic:

...the Government is treading on dangerous ground. Such a plan will compromise the judicial independence of the DPP, because it will make the office beholden to Government and government process. Accountability must be to the people of New South Wales through their elected representatives, not to government bureaucrats on short-term contracts. It is important that the DPP is accountable to Parliament, but independent from Government. Politicians must not run the judicial process: the judiciary must.³⁵

Nicholas Cowdery QC, Director of Public Prosecutions

Mr Cowdery said that he was first informed of the existence of the proposal on 7 February 2001 during a 'routine meeting' with the Attorney-General, and that he made a 'detailed written response' to the Attorney-General on 13 February 2001.³⁶ He considered the PPMB was unnecessary and that he had not been sufficiently consulted:

The present proposal ignores the facts that the COCOG suggestion [the Council on the Cost of Government's suggestion of creating a formal management board] was acted upon in 1999 and that there has been no complaint about the efficacy of the measures put in place. There has not been ongoing discussion with the DPP about the present proposal.³⁷

Contrary to the Attorney-General's assurance that the PPMB would be confined to 'housekeeping' issues, Mr Cowdery regarded any increase in supervision as detrimental:

Administrative independence of the Office is essential to safeguard against indirect interference in the independence of prosecutorial decision making. It is just as important as freedom from political or other improper influence.³⁸

³⁵ *Director of Public Prosecutions Amendment (Parliamentary Joint Committee) Bill 2001*, Second Reading Speech, *NSWPD(LA)*, 5 April 2001, p 13312.

³⁶ N Cowdery QC, *Media Release*, 15 February 2001. Available on the DPP website at <<http://www.odpp.nsw.gov.au>>

³⁷ *Ibid.*

³⁸ *Ibid.*

Mark Tedeschi, QC, Senior Crown Prosecutor

In an email to Crown Prosecutors on 9 February 2001, an extract of which was published in *The Sydney Morning Herald* on 15 February 2001, Mr Tedeschi stated:

The new board seems to me to be a rather crude device to impose a supervisory body over the director which would have significant (and inappropriate) input from the Attorney-General's department and the Police Service. ... The proposed changes could make us beholden unto the Commissioner of Police and the Attorney-General's department (with the heightened possibility of political interference) and would seriously compromise our independence.³⁹

John Nicholson SC, Senior Public Defender

In an article for *The Sydney Morning Herald*, Mr Nicholson warned: 'The proposed model seems fraught with perils. While it is not proposed to interfere with the independence of the DPP, the candidates nominated as potential members of the PPMB certainly raise the spectre of such interference.'⁴⁰

Mr Nicholson welcomed the Attorney-General's apparent opposition to the Police Commissioner participating in the PPMB, pointing out that the police and the DPP may have conflicting views about the handling of a case, and that the DPP also prosecutes police officers who commit criminal acts.

According to Mr Nicholson, even budgetary supervision has the potential to hamper the independence of the DPP's case management because finance can determine how policy is implemented.⁴¹ Like other commentators, Mr Nicholson also feared that the introduction of the PPMB would lay the foundations for further intervention:

³⁹ 'New DPP plan seen as bid to gag Cowdery', *Sydney Morning Herald*, 15 February 2001, p 1.

⁴⁰ J Nicholson SC, 'DPP's office must be left free of political interference', *Sydney Morning Herald*, 20 February 2001, p 14.

⁴¹ There is a difference between insufficient funding of a public sector office and the active supervision of its financial administration through an external committee. John McKechnie QC, the former DPP of Western Australia, has asserted that an 'obvious and subtle way to control a prosecutor's office is through the allocation of resources' but that under-funding does not impact on independence: 'A prosecution service can function fully, effectively and independently to the limit of its funding and then it simply stops functioning. ... So, if there is insufficient money to fund all prosecutions, notwithstanding prudential management, a service will simply be ineffective to the extent of the under-funding. That is, of course, a significant problem which ought not to occur, but it is not a problem of independence': J McKechnie QC, 'Directors of Public Prosecutions: Independent and Accountable' (1997) 15(2) *Australian Bar Review* 122 at 135.

Once a PPMB has been established, a threshold has been passed which creates the danger of interference and compromises the perception of independence. The creation of such a board makes change much easier in the future. Regulations can more readily be passed that would diminish the independence of the DPP as perceived by the community. Forceful and dominant personalities on the PPMB could also eat away at the DPP's independence.⁴²

Mr Nicholson called for greater discussion and public consultation on the matter:

Before any PPMB is created there must be community confidence that the DPP will not be imperilled, and that the changes will bring real benefit to the administration of criminal justice. As the debate stands, the community could not be satisfied on either score. Creating a PPMB is a change of such fundamental importance to the DPP and Crown prosecutors that it should not be embarked on without full community debate.⁴³

Editorial view of The Sydney Morning Herald

The Sydney Morning Herald's attitude to the PPMB issue was sceptical, observing that the proposal 'raises questions about the NSW Government's commitment to a justice system free from political interference.'⁴⁴

The Sydney Morning Herald joined others in expressing concern at the scope of any changes:

...until the full and final details of the proposal are available for scrutiny it is impossible to be confidently reassured that it would stick to housekeeping and not harm the independence of the DPP. ...

...this proposal, as far as can be seen so far, goes beyond what might be considered necessary to achieve any legitimate goal of financial responsibility.

...

Mr Debus yesterday backed away from [sic] the idea of having the Police Commissioner on any board overseeing the Office of the DPP, as well he might. It is surprising the suggestion was ever entertained. And Mr Debus insists that any argument with Mr Cowdery is only over money. But Mr Cowdery's equal insistence that independent exercise of the DPP's essential function - deciding whether and when to prosecute - is fully guaranteed only if his office also has administrative independence cannot be brushed aside.⁴⁵

⁴² Nicholson, n 40.

⁴³ Ibid.

⁴⁴ 'An independent DPP', *Sydney Morning Herald*, 16 February 2001, p 12.

⁴⁵ Ibid.

5.4 Review by the Council on the Cost of Government

The draft Cabinet minute on the PPMB was prompted, according to the Attorney-General, by a review of the DPP in 1998 by the Council on the Cost of Government (COCOG), and specifically COCOG's assessment of insufficient high-level executive management at the DPP.⁴⁶

COCOG carried out the review at the request of the Attorney-General, with the following terms of reference:

- (i) to assess the operational efficiency and effectiveness of the Office;
- (ii) to assess the adequacy of systems for resource allocation and monitoring within the Office;
- (iii) to establish benchmarks for comparison with similar organisations in both the public and private sectors;
- (iv) to advise on the current level of resources that are provided to support the operations of the Director; and
- (v) to advise on measures to improve the cost effectiveness of the Director.⁴⁷

The terms of reference did not include assessing the functions or powers of the Director nor examining particular prosecutions.

COCOG found deficiencies in funding, resources, technology and management. The review acknowledged that the productivity of the Office was affected by other parts of the criminal justice system and that there was 'significant wastage of the staff resources of the Office, primarily due to external factors outside the direct control of the Office.'⁴⁸ The overall recommendations of the review related to collection of data, staffing structure, quality of information technology and so on, and did not explicitly deal with the accountability of the Director.⁴⁹

Of greater relevance to the themes of this research paper were the findings on the management structure of the Office. The report observed that, at the time of the study, there appeared to be 'no effective high level executive management regime'.⁵⁰ In

⁴⁶ 'No room for Ryan on new DPP board', *Sydney Morning Herald*, 16 February 2001, p 4. Mr Cowdery was quoted in the same article as rejecting the Attorney-General's rationale because an Executive Board was established at the DPP in 1999, after the review by COCOG.

⁴⁷ Council on the Cost of Government, *Review of Office of the Director of Public Prosecutions*, November 1998, p 1. COCOG is part of the New South Wales Premier's Department and advises on improving the quality and value of government services.

⁴⁸ *Ibid*, p 19.

⁴⁹ *Ibid*, pp iv-vi.

⁵⁰ *Ibid*, p 37.

particular, while there were regular senior executive meetings, the Office lacked an executive board with rolling agenda, proper minutes, and formal action and reporting requirements. Executive lawyers carried out legal practitioner activities in addition to - and perhaps at the expense of - their management roles. The report suggested that the Office should consider establishing:

- a formal management board (referred to as the 'Executive Board') to focus on strategic management and management improvement issues, assisted by a 'small executive support team'; and
- the position of General Manager, to be responsible to the Director for the overall management of the Office, to head the executive support team and to be a key member of the Executive Board.⁵¹

6. PARLIAMENTARY COMMITTEE PROPOSAL

6.1 Background to the proposal

The *Director of Public Prosecutions Amendment (Parliamentary Joint Committee) Bill 2001* was introduced in the Legislative Assembly by Mr Chris Hartcher, the Shadow Attorney-General, on 5 April 2001. The Bill was read for a second time on that date and the debate was adjourned.

The Bill is similar to the *DPP Amendment Bill 1995*, introduced in the Legislative Assembly by Andrew Tink, the then Member for Eastwood. That Bill was defeated in 1997 at the second reading stage: see comparative discussion below at 6.3 on p 26.

The *DPP Amendment (Parliamentary Joint Committee) Bill 2001* proposes the amendment of the *DPP Act 1986* to establish a Parliamentary Joint Committee on the Office of the DPP.

The anticipated role of the Parliamentary Joint Committee is to monitor key aspects of the DPP, including:

- the allocation of funds to the DPP;
- the appointment of a Director;
- the exercise of the Director's functions.

In the Second Reading Speech of the *DPP Amendment (Parliamentary Joint Committee) Bill 2001*, Mr Hartcher explained that the impetus for the Bill was dissatisfaction with the Director's performance:

For some years now, the Director of Public Prosecutions [DPP] has been the subject of community comment and concern. The comment has been because

⁵¹ Ibid, p vi.

certain decisions taken by the DPP have not been seen to either represent or protect community interests and values. The concern has been because the function of the Director of Public Prosecutions is to uphold the rights of the community to be protected against criminals and criminal actions, and to feel secure in the knowledge that when criminals are caught, they will be judged before the law. However, increasingly this is not the case. A number of well-publicised cases where the DPP refused to move a matter to trial or to appeal against a sentence considered too lenient by the community highlights the need for accountability of this office - to Parliament and, through Parliament, to the people of New South Wales.⁵²

Mr Hartcher proceeded to identify some of the ‘well-publicised cases’, including the refusal of the Director to appeal the sentences imposed by the Supreme Court in August 2000 on three males who threw rocks from an overhead bridge, killing a truck driver named Mark Evans, and the decision of the Director in July 2000 not to prosecute Jeffrey Gilham for the alleged murder of his parents and brother in 1993, despite the ‘recommendation’ of the Coroner.⁵³

6.2 Provisions of the DPP Amendment (Parliamentary Committee) Bill 2001

Establishment and functions of the Parliamentary Committee

The *DPP Amendment (Parliamentary Committee) Bill 2001* inserts a new Part 4A into the *DPP Act 1986*, to establish a Parliamentary Joint Committee known as the Committee on the Office of the Director of Public Prosecutions.

The Committee is to be appointed as soon as practicable after the commencement of the first session of each Parliament: cl 30A of the Bill.

The functions of the Committee, outlined by cl 30B(1) of the Bill, are to:

⁵² NSWPD(LA), 5 April 2001, p 13310.

⁵³ In the Gilham case, the Coroner terminated a fresh inquest in April 2000 upon finding there was sufficient evidence to satisfy a jury beyond reasonable doubt that a known person had committed an indictable offence. See ss 19 and 22A of the *Coroners Act 1980* for the Coroner’s power to make findings and recommendations. Media coverage included: ‘DPP rejects charges over family deaths’, *Daily Telegraph*, 22 July 2000, p 12; ‘Coroner asks DPP to act on family deaths’, *Sydney Morning Herald*, 29 April 2000, p 9. The defendants in the Evans case, Sean Sutcliffe, Sean McGoldrick and Liam McGoldrick, pleaded guilty to manslaughter and were sentenced, respectively, to five years and three months imprisonment (non-parole period of three years); four years and five months imprisonment (non-parole period of two years and three months); and two and a half years periodic detention. The media reports contained predominantly critical views of the Director: ‘Carr outrage at jail terms, DPP appeal urged’, *Daily Telegraph*, 22 August 2000; ‘Sentencing row flares: DPP ‘like a cult leader’’, *Sun-Herald*, 27 August 2000, p 15; ‘Premier has overstepped his mark, says DPP’, *The Australian*, 23 August 2000, p 9.

- (a) recommend the **amounts of money** to be appropriated annually from the Consolidated Fund to finance the operation of the Office of the DPP, and comment generally on the budget of the Office,
- (b) monitor and review the exercise of the **Director's functions**,
- (c) **report to Parliament on any matters** relating to the DPP that in the opinion of the Committee should be brought to Parliament's attention,
- (d) examine each **annual report** and other reports made by the DPP and report to Parliament on any matter arising from those reports,
- (e) report to Parliament any changes that the Committee considers desirable to the **functions, structures and procedures** of the Office of the DPP,
- (f) inquire into any question in connection with its own operations that is referred to it by Parliament, and reporting accordingly.⁵⁴

The powers of the Committee, other than the financial capacity in cl 30B(1)(a), may be exercised in respect of matters occurring before or after the commencement of the new provisions.

Composition of the Committee

The proposed Committee consists of 11 members: three from the Legislative Council and eight from the Legislative Assembly: cl 30E(1). Each House appoints its own Committee members.

Ministers and the Parliamentary Secretary are not eligible for appointment as members: cl 30E(3). A chairperson and vice-chairperson of the Committee are to be elected by and from the members of the Committee: cl 30G.

Procedures of the Committee

Six members constitute a quorum (ie. the minimum number of persons to constitute a valid meeting) but the Committee must always meet as a Joint Committee: cl 30H(3).

A question arising is to be determined by a majority of votes of the members present and voting. The chairperson (or other member presiding at a meeting) participates in the vote and, in event of a tied result, has the casting vote: cl 30H(6).

Subclause 30J(3) provides that, subject to cl 30K, the Committee must take all evidence in public.

⁵⁴ Clause 30B(1)(f) is intended to ensure that the Committee acts when requested by Parliament: *NSWPD(LA)*, 5 April 2001, p 13312.

Power to veto appointment of Director

The Committee is empowered to veto the appointment of a Director: cl 30D. After the proposed candidate is referred to the Committee by the Minister, the Committee has up to 44 days to veto the appointment. This period is comprised of an initial 14 days, followed by a further 30 days if the Committee notifies the Minister that it requires more time to consider the matter. The Committee is required to inform the Minister of its approval or disapproval: cl 30D(3).

The Shadow Attorney-General argued that this power is ‘no different to that given to the oversight committee for the Office of the Ombudsman’.⁵⁵ At present, the Committee on the Office of the Ombudsman and the Police Integrity Commission has the ability to veto the appointment of a Director pursuant to s 4A of the *DPP Act* and s 31BA of the *Ombudsman Act 1974*.

Powers to require Director to give reasons and produce documents

The Committee has the power to send for persons, papers and records: cl 30J(1). For example, the Committee may require the Director or a Deputy Director to furnish - in person and/or in writing, as the Committee directs - the reasons for:

- (a) a decision not to institute a proceeding, or
 - (b) a determination that no bill of indictment be found, or
 - (c) a direction that no further proceedings be taken, or
 - (d) a decision not to institute an appeal,
- in a particular case: cl 30J(2).

In the Second Reading Speech, Mr Hartcher submitted that the Bill would make the Director’s deliberations more transparent and responsive to the public:

The Coalition is determined to ensure that when decisions are made by the DPP - particularly when they go against the tenet of community expectations and values - that the DPP is able to explain, and if necessary justify to an appropriate body, the reasons for such decisions. The Director of Public Prosecutions Amendment Bill will ensure this end is achieved.⁵⁶

...

[The Committee] will provide an appropriate mechanism for debate surrounding legal policy matters between the DPP and the community. It will ensure that when decisions taken by the DPP are broadly considered lenient or inappropriate, that the committee can hear first hand the reasons such

⁵⁵ NSWPD(LA), 5 April 2001, p 13312.

⁵⁶ Ibid, p 13311.

decisions were taken.⁵⁷

In the media, Mr Hartcher has sought to clarify that there is no intention for the Committee to engage in political interference. For example, Mr Hartcher assured Mike Carlton, a Sydney radio commentator, that the reforms would not reduce the Director's authority or impartiality:

Carlton:

You would bring the DPP before a Parliamentary Committee who in some circumstances might lean on him to demand that prosecution take place for political motives?

Hartcher:

No, not at all because (a) it would represent all sides of Parliament and both Houses of the Parliament, (b) it would not have the power to direct him any more than the ICAC Committee has the power to direct the ICAC Commissioner. When the ICAC Commissioner appears in Parliament he's not told by Parliamentarians who he should investigate and who he should not investigate - he is simply telling the - or she is simply telling the Parliament how they operate and on what basis they're making decisions which affect the public interest...

...

...there is nothing in the Bill which undermines the fact that he will be the final decisionmaker. What it does do though is ask him to tell the public, who after all he is representing, as to how he makes his decisions and why he makes them. If he's not going to institute an appeal against a very lenient sentence - and there's some excellent examples as you and many of your listeners are only too well aware - then he should be prepared to tell the public why -

Carlton:

He does, he comes out and says 'I don't believe this would stand up in court, we haven't got the evidence.'

Hartcher:

That's it, a single sentence: 'I don't believe this would stand up in court.'
These single paragraph - these single sentence statements, and that's it...⁵⁸

Financial provisions

The functions of the Committee under cl 30B include recommending the sums to be appropriated out of the Consolidated Fund for the capital works and services of the DPP each financial year, and commenting on the Office's budget.

⁵⁷ Ibid, p 13311.

⁵⁸ Mike Carlton interviewing Chris Hartcher on Radio 2UE, 5 April 2001. The interview was transcribed by the author of this paper from a tape recording.

The Committee is to notify the Treasurer in writing of the sums recommended under cl 30B, no later than five months before the beginning of the financial year to which the recommendation relates: cl 30C.

Mr Hartcher advocated that the Committee's financial supervision would alleviate the funding problems of the DPP and curb alleged excesses:

Such a function will not only ensure proper accountability of expenditure and operations, it will also ensure that the office receives sufficient funding to carry out the role of first prosecutor of this State. Funding of the office of the DPP has been in crisis now for some years.⁵⁹

...

The joint committee's proposed function to comment generally on the budget of the office of the DPP will also ensure that funding is spent on criminal prosecutions, and not on numerous overseas trips or unnecessary bureaucratic administration. The 1999-2000 annual report showed that the DPP took seven overseas trips and visited eleven countries, costing the taxpayer more than three-quarters of a million dollars. That is the same office that only the year before cried insufficient funding to prevent a criminal crisis from looming. The Government cannot have it both ways. It can no longer refuse to allocate sufficient and recurrent funding to allow the DPP to do his job well, while at the same time providing no accountability for the way that money is spent. The community has a right to ask - and receive an answer - as to the validity of the State's top prosecutor spending such an amount on overseas travel. Under this bill, such questions could be asked, and answered.⁶⁰

Confidentiality provisions

Clause 30K caters for the protection of confidentiality. If any evidence proposed to be given before the Committee, or a document to be produced to the Committee, relates to a secret or confidential matter, the Committee must take the evidence in private, or direct that the document, or part thereof, be treated as confidential in the following circumstances:

- at the request of a witness giving the evidence or person producing the document - except the Director or Deputy Director;
- when the evidence or document relates to the proposed appointment of the Director.

The Committee may take evidence in private, or direct that a document be treated as

⁵⁹ NSWPD(LA), 5 April 2001, p 13311.

⁶⁰ Ibid, p 13312. The NSW DPP's *Annual Report 1999-2000* sets out the overseas travel of the Director and other DPP staff, and the extent to which each trip was funded by the Office: Appendix 27, pp 65-67. Travel expenses of \$866,000 are identified on p 89.

confidential:

- in other circumstances where the evidence or document relates to a secret or confidential matter, without the request of the witness; or
- in relation to a decision referred to in cl 30J(2), namely, not to prosecute, to ‘no bill’ a matter, not appeal a decision and so on.

Offences against the confidentiality provisions attract a maximum penalty of three months or a fine of 20 penalty units (\$2200) and occur in circumstances where any person, including a Committee member:

- discloses evidence relating to the appointment of the Director: cl 30K(4);
- discloses whether or not the Committee proposes to veto the appointment of a person as Director: cl 30K(5);
- discloses or publishes evidence given in private, in contravention of the requirements under cl 30K(7)-(9).

The confidentiality provisions of cl 30K do not preclude the disclosure or publication of evidence that has already been lawfully published, or the disclosure by a person of a matter of which the person became aware other than by the giving of evidence before the Committee: cl 30K(10).

6.3 Contrasting the 2001 Bill and its predecessors

The *DPP (Parliamentary Committee) Amendment Bill 2001* was preceded by the *DPP Amendment Bill 1995*. That Bill was introduced by Andrew Tink, the Member for Eastwood, in the Legislative Assembly on 16 October 1995 and read for a second time on that date. Before any debate occurred, the Bill lapsed but was restored on 2 May 1996. The Bill was debated on 16 October 1997 and was defeated. In the Second Reading Speech on 26 October 1995, Mr Tink stated that the Bill was prompted by ‘recent brawls’ between the Government and the DPP at that time, particularly over the issue of mandatory life sentences.⁶¹

Mr Tink emphasised that the Committee would create an opportunity for the Director to express his views to Parliament on policy and funding, and would be ‘a proper forum in which to ventilate his opinions’, rather than in the media.⁶² The Director ‘could raise and discuss...issues with members of Parliament before the final consideration by the Parliament of legislation in which the Director of Public Prosecutions has a professional interest.’⁶³

Mr Tink also asserted that the accountability of the Director to Parliament solely through

⁶¹ *NSWPD(LA)*, 26 October 1995, p 2427.

⁶² *Ibid*, p 2427.

⁶³ *NSWPD(LA)*, 16 November 1995, p 3377.

the Attorney-General was inadequate, alleging that the Attorney-General had attempted to discourage the Director from appearing before the Standing Committee on Law and Justice in 1995.⁶⁴

The 1995 Bill was very similar to the 2001 Bill. But the changes that have been made to the present proposal may shed some light on its potential consequences. For example, the Explanatory Note of the 2001 Bill omits the following paragraph which featured in the 1995 Bill:

...the monitoring and review [of the Director's functions] will not extend to recommending that the Director of Public Prosecutions make a decision that relates to the institution or cessation of prosecutions or proceedings in a particular case, or to reconsidering any such decision.

The 2001 Bill has also dropped the following provision, which appeared at cl 30B(2) in the 1995 Bill:

Nothing in this Part [the intended new Part 4A of the *DPP Act*] authorises the Joint Committee to recommend that a decision be made, or to reconsider a decision:

- (a) to institute or not institute a proceeding, or
- (b) to direct that no further proceedings be taken, in a particular case.

Clause 30J, which was absent from the 1995 Bill, requires the Director or Deputy Director to furnish the Committee with reasons for a decision not to institute proceedings, not continue proceedings, or not to lodge an appeal.

In the confidentiality provisions of the 2001 Bill, cl 30K(1) excludes the Director or Deputy Director from being able to request the Committee to take evidence in private or treat a document as confidential. The 1995 Bill did not have this limitation, allowing confidentiality to be observed more broadly 'at the request of the witness giving the evidence or the person producing the document'.

However, the 2001 Bill adds a potential protection in the form of cl 30K(3), which allows the Committee to take evidence in private or direct that a document be treated as confidential where it relates to no billing a matter or another determination under cl 30J.

6.4 Comparison with Committees on the Ombudsman and ICAC

In the Second Reading Speech of the *DPP Amendment (Parliamentary Joint Committee) Bill 2001* and on a number of other occasions, the Shadow Attorney-General has urged that the Director of Public Prosecutions should be answerable to Parliament in a similar manner to the Ombudsman and the Commissioner of the Independent Commission

⁶⁴ Ibid, pp 3377, 3380; *NSWPD(LA)*, 16 October 1997, p 938.

Against Corruption (ICAC). For instance, during a radio interview in April 2001, Mr Hartcher stated:

What we would be proposing is like the Ombudsman, like the ICAC Commissioner; he [the Director] would be accountable to the Parliament and the public through a parliamentary committee of oversight. They wouldn't direct him but they would meet with him regularly; they would have the power to discuss with him the policies he was pursuing, they would have the power to ask him to advise them as to why he had made certain decisions such as not to institute prosecutions or not to commence appeals...

...

The Ombudsman is accountable to the Parliament and so is the ICAC Commissioner, both of them. Nobody pretends that their independence is prejudiced or jeopardised by being asked to discuss their budget, by being asked to discuss their operational activities, by being asked to discuss what policies they're pursuing and by being asked to discuss in certain cases the decisions that they've made. That does not mean that these decisions would necessarily be overturned but the public and the Parliament are entitled to know just how the prosecutorial system of this State is being conducted. It is not some form of religious organisation clouded in obscurity.⁶⁵

The Committee on the Office of the Ombudsman and the Police Integrity Commission is established by Part 4A of the *Ombudsman Act 1974*, while Part 7 of the *Independent Commission Against Corruption Act 1988* creates the Committee on the Independent Commission Against Corruption. Their activities include:

- to monitor and review the exercise of the Ombudsman's/ICAC's functions;
- to report to both Houses of Parliament on any matter connected to the exercise of those functions;
- to report any change that the Committee considers desirable;
- to examine reports by the Ombudsman/ICAC;
- to veto the appointment of the Ombudsman/ICAC Commissioner.⁶⁶

These functions are mirrored in the *DPP Amendment (Parliamentary Joint Committee) Bill 2001*. However, the proposed Committee on the DPP would have the additional ability to make recommendations concerning the Office's budget: cl 30B(1)(a). Also, the *Ombudsman Act* and the *ICAC Act* stipulate activities which are not authorised to be undertaken by their respective Parliamentary Committees, such as reconsidering the findings, recommendations, or determinations of the Ombudsman/Commissioner in relation to a particular investigation or complaint. This feature is lacking in the *DPP Amendment (Parliamentary Joint Committee) Bill*, which may suggest an intention for the supervisory powers over the Director to be wider.⁶⁷

⁶⁵ The Mike Carlton program on Radio 2UE, 5 April 2001. See also the Second Reading Speech, *NSWPD(LA)*, 5 April 2001, p 13311.

⁶⁶ See ss 31B, 31BA of the *Ombudsman Act* and ss 64, 64A of the *ICAC Act*.

⁶⁷ Note that Part 6 of the *ICAC Act* implements another committee, although not a

Independence, impartiality and accountability are clearly important qualities common to the Ombudsman, Director of Public Prosecutions and the Commissioner of the ICAC. However, there are unique elements to the statutory basis and purpose of each position. The Ombudsman and ICAC have investigative roles and are ‘watchdogs’ over the conduct of public authorities and public officials. The DPP does not investigate and its prosecutions are tested by the court process, although the Director’s refusal to prosecute or to instigate a Crown appeal is less open to review.

6.5 Responses to the Parliamentary Committee proposal

The Attorney-General, the Hon. Bob Debus, has firmly rejected the concept of a Parliamentary Committee to scrutinise the DPP.⁶⁸ During a recent radio interview, he stated:

The DPP and I don’t agree about absolutely everything all the time but it is in my view ludicrous to be suggesting that a committee of Members of Parliament should be in any way able to oversight the actual legal prosecutorial decisions of the DPP. That’s like seeing who can clap the loudest to see whether we should be prosecuting somebody or not. It is a fundamental contradiction of what we call the separation of powers but which just means in common sense that the courts and the parliament should exercise their powers separately...

...It’s another matter if there was some sort of a committee which concerned itself with investigation of aspects of the administration of the office or that sort of thing, although again I don’t favour that being a parliamentary arrangement at all... I know that there is a Select Committee which interviews the British Director of Public Prosecutions from time to time about various aspects of their general policy and their administration but they are forbidden to intervene in any way in any particular case...⁶⁹

Parliamentary Committee. The Operations Review Committee consists of the ICAC Commissioner, the Assistant Commissioner, the Police Commissioner and five other persons recommended by the Attorney-General with the concurrence of the ICAC Commissioner. The Operations Review Committee advises the Commissioner whether the ICAC should investigate or discontinue an investigation of a complaint. The concept of establishing a similar body within the DPP was referred to during debate of the *DPP Amendment Bill 1995* in 1997. For example, Andrew Tink MP, who introduced the Bill, stated: ‘The idea of an operations review committee, which the Premier suggested should be chaired by the Director of Public Prosecutions himself, if it were to follow the ICAC model, would simply be a waste of time. One of the major failings of the operations review committee of the ICAC is that it becomes a committee of support to the ICAC commissioner. I believe such a committee will simply become a committee of support to the DPP. Plainly that is not what is needed. What is needed is a robust committee that is prepared to and can take the fight to the DPP’s office.’ *NSWPD(LA)*, 16 October 1997, p 935.

⁶⁸ ‘The high priest of prosecution’, *Daily Telegraph*, 28 August 2000, p 26; ‘Sentencing row flares: DPP ‘like a cult leader’’, *Sun-Herald*, 27 August 2000, p 15.

⁶⁹ Mike Carlton interviewing the Attorney-General, the Hon. Bob Debus, on Radio 2UE, 5 April 2001.

Nicholas Cowdery QC labelled the Opposition's proposal as 'unprincipled, impractical and unnecessary' and noted that it had gone further than similar Coalition proposals in the past:

In this attempt the Opposition dropped any pretence that the committee was to be a general overseer of the management and administration of the Office. The Bill contained specific provisions enabling the committee of 11 politicians to monitor and review any decision made in the Office and to bring before it any officer to explain his or her decision.

Mr Cowdery also reiterated the observation which he made in response to the Government's management board proposal, that administrative independence is just as important as independence in prosecutorial decision-making.⁷⁰

7. STANDING COMMITTEES OF NEW SOUTH WALES PARLIAMENT

There is scope under the broad terms of reference of several Standing Committees of the New South Wales Legislative Assembly and Legislative Council to assess the operations and performance of the DPP.

Legislative Council

The **Law and Justice Committee** was established as a Standing Committee by resolution on 24 May 1995 and was reappointed on 25 May 1999. Its functions are to inquire into, consider and report to the Legislative Council on:

- (a) matters concerned with legal and constitutional issues including law reform, parliamentary matters, criminal law and administrative law,
- (b) issues arising in connection with the New South Wales criminal justice system, including matters concerned with the Attorney-General, police, corrective services and juvenile justice,
- (c) industrial relations,
- (d) emergency services, and
- (e) fair trading.⁷¹

⁷⁰ The Director's comments on the Parliamentary Committee proposal were made in his opening address at this year's DPP Solicitors' Conference, Sydney Masonic Centre, 18 April 2001.

⁷¹ Motion by the Treasurer, the Hon. Michael Egan, agreed to on 25 May 1999: *NSWPD(LC)*, 25 May 1999, pp 289-290. See also: *Standing Rules and Orders of the Legislative Council of New South Wales*, as at June 1999, Office of the Legislative Council. Standing Order 257B provides that unless stated otherwise, the Rules and Orders relating to Select Committees shall apply to Standing Committees. However, the Standing Orders on Select Committees in Part XXIV are of a general nature and it is necessary to refer to the precise terms of the particular Committee.

Furthermore, each Standing Committee is to inquire into and report to the House on anything relevant to the Committee's functions which is referred to it by resolution of the House or by a Minister, and may examine any relevant petition or annual report.

General Purpose Standing Committee No.3 is allocated the portfolio of the Attorney-General, among other portfolios. One of the regular activities of the Committee is to analyse the Budget Estimates, that is, the proposed expenditure for the portfolio area. During the examination of the Attorney-General on 22 June 2001, questions were asked about the finances of the Office of the DPP, including expenditure on administration costs, on answering correspondence from families of victims of crime whose cases the DPP declined to prosecute, and the purposes of overseas trips taken by the Director.⁷²

Each of the five General Purpose Standing Committees can inquire into and report on: any matters referred to them by the House; the expenditure, performance or effectiveness of a government department, statutory body or corporation; and the annual reports of such entities.⁷³

Legislative Assembly

A number of Committees of the Legislative Assembly specialise in assessing the financial and administrative credentials of State organisations like the DPP. The **Public Accounts Committee** was created by the *Public Finance and Audit Act 1983*. Section 57 outlines its activities, including:

- to examine the Public Accounts transmitted to the Legislative Assembly by the Treasurer,
- to examine the accounts of authorities of the State,⁷⁴
- to examine the opinion or any report of the Auditor-General laid before the Legislative Assembly,
- to report to the Legislative Assembly on any item in, or circumstances pertaining to, those accounts, reports or documents that the Committee considers ought to be brought to the notice of the Legislative Assembly,

⁷² General Purpose Standing Committee No.3, *Examination of proposed expenditure for the portfolio area: Attorney-General*, Friday 22 June 2000, pp 12-14. During questioning, amounts such as \$62.4 million for the DPP's total expenses in 2001-2002 were quoted from the NSW Treasury's *Budget Estimates 2001-02, Budget Paper No. 3*, Volume 1, p 4-13.

⁷³ The terms of reference of the Committees were outlined in a motion agreed to on 13 May 1999. The purpose of the motion was to re-establish the General Purpose Standing Committees which were established on 7 May 1997: *NSWPD(LC)*, 13 May 1999, pp 188-192.

⁷⁴ The definition in s 4 of an 'authority' includes a statutory authority and a Public Service Department.

- to suggest to the Assembly any alteration which the Committee thinks desirable in the form or method of keeping those accounts, or in the receipt, expenditure or control of money relating to those accounts,
- to inquire into and report on any question in connection with those accounts which is referred to it by the Legislative Assembly, a Minister of the Crown or the Auditor-General.

The powers of the Committee do not extend to an examination of the estimates of any proposed expenditure by the State or by an authority of the State.

The **Public Bodies Review Committee** was established on 31 May 1995,⁷⁵ with the purpose of considering annual reports of all State and local government public sector agencies. The Committee can inquire into: the adequacy and accuracy of financial and operational information contained in any annual report; issues arising that concern the achievement of the agency's objectives; any other matter referred to it by the Minister or the Legislative Assembly.

8. VICTORIA

Victoria was the first jurisdiction in Australia to establish a DPP. Previously, prosecutions for indictable offences were handled by the Criminal Law Branch of the Crown Solicitor's Office. Presentments⁷⁶ were signed by the Attorney-General, the Solicitor-General or by Prosecutors for the Queen. The *Director of Public Prosecutions Act 1982* was enacted by the Cain Labor Government and received assent on 21 December 1982.

The Chief Crown Prosecutor, Paul Coghlan QC, was recently elevated to the position of Director on an acting basis, after Geoffrey Flatman QC was appointed a Judge of the Supreme Court of Victoria. The total staff of the Office at 30 June 2000 was approximately 170 persons.⁷⁷ The total expenditure in the same period was \$21.5 million.⁷⁸

Major changes occurred to the statutory basis of the Victorian DPP in 1994. It is worth tracing the transition from the *DPP Act 1982* to the *Public Prosecutions Act 1994* as a case study of the difficult relationship between independence and accountability.

⁷⁵ Parliament of New South Wales, Report of the Public Bodies Review Committee, *Towards Better Performance Reporting*, November 2000, p 13.

⁷⁶ The usual method of prosecuting indictable offences in Victoria is by way of a presentment, not an indictment.

⁷⁷ This figure is comprised of 151.4 permanent and 18.4 temporary staff members: Office of the DPP (Victoria), *Annual Report 1999-2000*, p 120.

⁷⁸ *Ibid*, p 127.

8.1 The original legislation - Director of Public Prosecutions Act 1982

The Act did not make provision for a Deputy or Associate Director, Crown Prosecutors, or a Solicitor for Public Prosecutions.

The Director, as now, was appointed by the Governor in Council and had to be a barrister and solicitor of the Supreme Court of not less than eight years' standing: s 3. But the Director could hold office until the age of 65 and the entitlements were those of a puisne Judge of the Supreme Court: s 4. The period of appointment changed in 1994.

The Director's main prosecutorial functions, and the powers to furnish guidelines, give directions and seek information (ss 9-13) were the same as in the present Act. However, the system of 'special decisions', requiring the Director to undertake consultation, did not exist. Section 14 granted the Director the equivalent capacity to the Attorney-General to enter a *nolle prosequi* (a discontinuance of criminal proceedings). The 1994 legislative regime categorised a *nolle prosequi* as a 'special decision'.

Section 9(2)-(3), which stated that the Director was responsible to the Attorney-General and yet had authority in the preparation, institution and conduct of proceedings under the Act, was replicated in s 10 of the *Public Prosecutions Act 1994*.

8.2 Planned changes to the DPP in 1993

In 1993 the Kennett Liberal Government proposed sweeping changes to the Office of the DPP in Victoria.⁷⁹ The events that unfolded indicate the potential for politics to encroach on the status of the Director. Numerous commentators considered that the plans for the DPP were part of a 'law and order' campaign by the Government to maximise control over all decision-making in public administration. Some commentators went further and claimed that the Government was retaliating against the Director, Bernard Bongiorno QC, for considering laying contempt charges against Premier Jeff Kennett, following public statements made by him about a murder investigation.⁸⁰

Another alleged source of disharmony between the Kennett Government and Mr Bongiorno was the investigation by the National Crime Authority (NCA) of John Elliott, the former Federal President of the Liberal Party, especially as the Attorney-General, Jan Wade, had directed the Victorian Government Solicitor not to provide legal representation to the Director to defend an action brought by Mr Elliot against the Director and the NCA for conspiracy to damage Mr Elliott and the Liberal Party.⁸¹

⁷⁹ Details of a proposed Bill were reported in the *Herald Sun* and *Sunday Age* in Victoria in December 1993: X O'Connor, 'Victorian Director of Public Prosecutions' (1994) 68(7) *Australian Law Journal* 488 at 488.

⁸⁰ C Corns, 'The Politics of Prosecutions' (1994) 68(4) *Law Institute Journal* 276 at 279.

⁸¹ J McCulloch et al, 'Putting the Politics Back into Prosecution' (1994) 19(2) *Alternative Law Journal* 78 at 79; J McCulloch, 'The Bongiorno Affair' (1995) 20(3) *Alternative Law Journal* 140. McCulloch suggests that the Director may also have been unpopular because of his decision in 1993 to charge several police officers over some fatal shootings in the late 1980s. Other public sector bodies which had clashed with the

The cutbacks to the powers of the Director contemplated by the Kennett Government in 1993 represented a degree of supervision more extreme than over any DPP in Australia. Some of the legal and academic literature on the topic refers to an 'original Bill', but members of the Victorian Government tended to use the description 'draft Bill'.⁸² The changes which eventuated included:

- **repeal** of the *Director of Public Prosecutions Act 1982*;
- **name changed** to 'the Office of Public Prosecutions';
- creation of a **Solicitor for Public Prosecutions**;
- decision-making of the Director to be shared with a **Director's Committee**, but not including a Deputy Director as originally envisaged;
- **term of office** to be set - the period referred to in the draft/original Bill was seven years⁸³ but was increased to ten years in cl 4(2) of the *Public Prosecutions Bill 1994*;
- **Committee for Public Prosecutions** to be formed - combining internal and external participants (not a Parliamentary Committee): see commentary on p 41;
- **contempt of court proceedings** restricted - only to be brought by the Attorney-General.

The most radical concept, which was dropped prior to the *Public Prosecutions Bill 1994*, was the creation of a Deputy Director with powers greater in some respects than the Director. As originally conceived, the Deputy was able to veto critical decisions of the Director and, in the event of a disagreement between the two, the view of the Deputy prevailed.

Kennett Government, such as the Equal Opportunity Commission and the Coroner's Office, were also being subjected to greater scrutiny.

⁸² According to Dr Chris Corns, a law lecturer and member of the Victorian bar, there was a *Public Prosecutions Bill 1993*, entitled 'Cabinet Print 5/11/93' and labelled 'Confidential': n 80, p 277. Xavier O'Connor QC explained the difference between the terms 'original Bill' and 'draft Bill' as follows: 'In order to understand the whole episode, it is necessary to consider the now abandoned provisions of the original Bill. It might be thought that to do so attaches too much importance to what is now described by the Victorian government as never having been more than a Draft Bill. However, the proposals contained in the original Bill are significant, if for no other reason than that they were, until shortly before the changes were announced, proposed and defended by the Attorney-General as a desirable agenda for reform.' O'Connor, n 79, pp 488-489.

⁸³ This provision was apparently cl 4(3) of the 'confidential' *Public Prosecutions Bill 1993*: Corns, n 80, p 278. The same term of appointment applied to the proposed Deputy Director, pursuant to cl 14 of the 1993 Bill.

The written approval of the Deputy Director was to be required for a range of actions, including:

- bringing contempt proceedings: cl 23(1)(c),(2)(b) of the 1993 Bill;⁸⁴
- overruling the decision of a Crown Prosecutor to make a presentment or to issue a *nolle prosequi*: cll 23(2)(a), 25(2);
- issuing guidelines with respect to prosecutions: cl 26;
- ‘calling in’ a police prosecution with a view to either taking it over, or sending it back to the police accompanied by advice;⁸⁵

The Deputy Director was to be responsible to the Attorney-General rather than to the Director. This contradicted the practice in every Australian jurisdiction that had a Deputy Director. If a politically aligned person was appointed to the Deputy Director’s position, the decision-making of the Director could have been influenced by the Government. Not surprisingly, the reaction to the planned status of the Deputy Director was extremely negative.⁸⁶

The anticipated changes caused an uproar in the Victorian legal community. Prominent critics included the Victorian Bar Council, the Law Institute of Victoria, the Council for Civil Liberties, the International Commission of Jurists, senior members of the judiciary, law academics and Directors of Public Prosecutions from around Australia. By contrast, the only substantial support for the proposals, outside the Kennett Government itself, came from the Police Association union and the Victims of Crimes Assistance League.⁸⁷

8.3 The modified proposal - the Public Prosecutions Bill 1994

On 16 March 1994, the Victorian Attorney-General, Jan Wade, announced a number of alterations to the draft Bill, most notably the abandonment of the position of Deputy Director. The *Public Prosecutions Bill 1994* passed through both Houses of Parliament in late May.

⁸⁴ Clause numbers are from the ‘confidential’ *Public Prosecutions Bill 1993*, as reported by Corns, n 80, p 278.

⁸⁵ Xavier O’Connor QC suggested that giving the Deputy Director the power to veto this function could, in effect, prevent the complaint from being investigated before anyone in the DPP Office had read the file: n 79, p 490.

⁸⁶ As Xavier O’Connor observed, ‘It is contrary to all ordinary notions of good order to make a subordinate directly responsible to the same authority as a superior and to give the subordinate powers of veto over the superior’: n 79, p 490.

⁸⁷ *Ibid*, p 488; J McCulloch et al (1994), n 81, p 78.

The omission of the word ‘Director’ from the title of the Bill, and the renamed ‘Office of Public Prosecutions’ (as opposed to Office of the Director of Public Prosecutions) was interpreted by some commentators as symbolising the intention to decrease the powers granted to one individual.⁸⁸

The Director was separated from the Office of Public Prosecutions, which was headed by the Solicitor for Public Prosecutions: cl 38. The rationale for the change was that for the Director to perform the roles of both the chief prosecutor in the State and the chief executive of the Office ‘denies the prosecutions office the leadership of a specialist administrator.’⁸⁹

The Bill required a Director’s Committee to be convened afresh each time the Director considered a ‘special decision’. The Attorney-General explained that this process ‘preserves the independence from government of prosecutorial decisions, while giving the decision maker and the community the benefits of a consultative process for use in a limited class of special cases.’⁹⁰ The composition and functions of the Director’s Committee have not changed: see below at p 39.

The separate Committee for Public Prosecutions was formulated by the Bill to have a significant role, from specific duties such as the establishment of guidelines on the circumstances in which an ordinarily ‘special decision’ was not to be treated as such, to the very general capacity to ‘advise on the operation of the prosecutorial system’: see p 41. The opportunity for a lay person to be appointed to the Committee by the Governor in Council was applauded by the Attorney-General in her Second Reading Speech:

For the first time this position makes it possible for an individual chosen from outside the select inner circle of the legal profession to play a role in an operational body at the highest level of the criminal justice system.⁹¹

The ability to bring criminal contempt proceedings was limited to the Attorney-General by cl 46 of the Bill, subject to a number of exceptions provided in cl 46(5).⁹² Previously, an application to a court for the punishment of a person for contempt of court could also be made by the Director or any other person with sufficient standing. The change may have been prompted by the Government’s annoyance when the Director, Bernard Bongiorno QC, considered initiating contempt proceedings against the Premier, Jeff

⁸⁸ For example, Corns, n 80, p 278.

⁸⁹ J Wade, Attorney-General, Second Reading Speech, *Public Prosecutions Bill 1994*, VPD(LA), 21 April 1994, p 1054.

⁹⁰ *Ibid*, p 1054.

⁹¹ *Ibid*, p 1056.

⁹² The exceptions included the right of a person to apply to a court for punishment of another person for contempt by breaching a court order, and the power of a court to deal with contempt summarily of its own motion.

Kennett, for comments he made about an alleged serial killer. The Attorney-General, Jan Wade, maintained that it was appropriate for contempt proceedings to be vested exclusively in the Attorney-General because of the danger of a conflict of interest occurring when the Director was responsible for prosecuting a defendant and also ensuring the defendant's trial was fair by bringing contempt proceedings.⁹³

The *Public Prosecutions Act 1994* commenced in July 1994, repealing the *DPP Act 1982*. Bernard Bongiorno QC resigned as Director in October 1994. In his last Annual Report, he wrote:

Although it [the new Act] preserves the Director's independent decision making function (albeit now constrained by a bureaucratic process of compulsory consultation with other designated officials, unknown in any other prosecution system of which I am aware) it removes the Director's control over the staff who perform the actual prosecution function and the budget which pays for it. These are now administered by the Solicitor for Public Prosecutions who is himself responsible not to the Director but to the Attorney-General.⁹⁴

8.4 Independence revisited - the Public Prosecutions (Amendment) Act 1999

The Bracks Labor Government which succeeded the Kennett Liberal Government passed the *Public Prosecutions (Amendment) Act 1999*. Commencing on 22 December 1999, the Amendment Act revived some of the original principles of the *DPP Act 1982*.

The Amendment Act repealed ss 4-8 of the *Public Prosecutions Act 1994*, pertaining to the appointment and conditions of service of the Director, and inserted those provisions as ss 87AB-AF of the *Constitution Act 1975*. The Attorney-General, Rob Hulls, explained in the Second Reading Speech to the *Public Prosecutions (Amendment) Bill 1999* that the transfer 'entrenches those provisions in the Constitution Act so that in future they may only be repealed or amended by a bill passed by an absolute majority of members in each house of Parliament.'⁹⁵

The Amendment Act also repealed s 46 of the *Public Prosecutions Act 1994* which had granted the Attorney-General the exclusive power to bring contempt proceedings, subject to limited exceptions. The Labor Attorney-General, in rejecting the former Government's rationale for the restriction, noted that the Director could refer a potential contempt case to the Attorney-General in the event of a conflict of interest, and that even if the Director decided for tactical reasons not to bring contempt proceedings, the Attorney-General could still do so.⁹⁶ The common law right of 'ordinary' people to bring

⁹³ Wade, n 89, p 1055.

⁹⁴ Office of the DPP (Victoria), *Annual Report 1993-1994*, p 4.

⁹⁵ VPD(LA), 25 November 1999, p 558.

⁹⁶ *Ibid*, pp 557-558.

contempt proceedings was restored by the Amendment Act's insertion of s 61 into the *Supreme Court Act 1986*.⁹⁷

8.5 The current legislation - the Public Prosecutions Act 1994

The Act was assented to on 7 June 1994 and had commenced operation in its entirety by 1 July 1994.

Appointment of Director

The provisions relating to the Director's appointment, terms and conditions, resignation and removal from Office were transferred from ss 4-8 of the *Public Prosecutions Act 1994* to ss 87AB-AF of the *Constitution Act 1975* in 1999: see explanation at 8.4 on p 37.

The Governor in Council may appoint as Director a person of not less than eight years' standing as a barrister and solicitor of the Supreme Court. The person appointed holds office for a term of 10 years or for a longer term not exceeding 20 years, specified in the instrument of appointment, and is eligible for reappointment: s 87AB of the *Constitution Act 1975*.

The Director must not engage in the practice of law or any paid employment outside his or her duties, without the consent of the Attorney-General: s 87AC.

Sections 87AB-AF are protected from amendment by s 18 of the *Constitution Act* which stipulates that legislation altering the Act may not be presented to the Governor for assent unless the second and third readings of the relevant Bill have passed with an absolute majority of the Legislative Assembly and the Legislative Council.

The Director can only be removed from office by a resolution of both Houses of Parliament declaring that the Director ought to be removed: s 87AI.

Powers and functions

The functions of the Director are outlined by Part 4 of the Act and include:

- to conduct proceedings in the High Court, Supreme Court or County Court for any indictable offence, and committal proceedings⁹⁸ in the Magistrates' Court;
- to take over any proceedings for indictable or summary offences;
- to conduct confiscation proceedings: s 22(1).

⁹⁷ Section 61 declares that 'The law relating to the right of any person to apply to a court for punishment of a person for a contempt of court is as if section 46 of the *Public Prosecutions Act 1994* had not been enacted and the common law has effect accordingly.'

⁹⁸ The DPP acquired committals in the Melbourne metropolitan area in 1995 and across the State in 1998: Office of the DPP (Victoria), *Annual Report 1999-2000*, p 7.

Unlike in New South Wales, the Director in Victoria has the power to grant an indemnity or undertaking: s 22(1)(ca), (cb). The Director may apply to a court for punishment of a person for contempt of court in a criminal proceeding: s 22(1)(ba)(iii). The Director can also refer to the Attorney-General any matter in which the Director considers it may be desirable for the Attorney-General to initiate contempt proceedings.

In the performance of his or her functions, the Director must have regard to:

- considerations of justice and fairness; and
- the need to conduct prosecutions in an effective, economic and efficient manner; and
- the need to ensure that the prosecutorial system gives appropriate consideration to the concerns of the victims of crime: s 24.

The Director may issue guidelines to Crown Prosecutors, police officers and other persons, concerning the prosecution of offences but not particular cases: s 26.

Section 27 enables the Director to be provided with certain information when proceedings are referred to him or her, while s 28 authorises the Director to request police assistance in the further investigation of a criminal proceeding.

Director's Committee

The Director may only perform a function that depends on making a 'special decision' after obtaining the advice of a Director's Committee convened to consider that determination: s 22(2). The definition of a special decision in s 3 includes:

- to present a person for an offence when a Magistrate ordered the person to be discharged at committal;
- to enter a *nolle prosequi* (discontinuation of a proceeding) after a person is committed for trial on the respective charge; to present a person for an offence without a committal proceeding being conducted, except where the person has elected to stand trial without a committal;
- to present a person for an offence if a Crown Prosecutor (or equivalent) has advised against doing so;
- to enter a *nolle prosequi* when a Crown Prosecutor had advised against doing so;
- to seek any relief in respect of an order of the Supreme Court or the County Court quashing or granting a permanent stay, on the ground that trying the person for the offence would constitute an abuse of process;
- to issue guidelines on the prosecution of offences.

A Director's Committee consists of:

- the Director (Chairperson);
- the Chief Crown Prosecutor;
- the Crown Prosecutor, Associate Crown Prosecutor, or legal practitioner who dealt with the matter, in the case of a special decision under s 3(d) or 3(e) (ie. a decision to

present a person for an offence when a Crown Prosecutor has declined to do so or a legal practitioner has advised against doing so, or to enter a *nolle prosequi* against advice);

Organisational Structure of the Director and Office of Public Prosecutions in Victoria

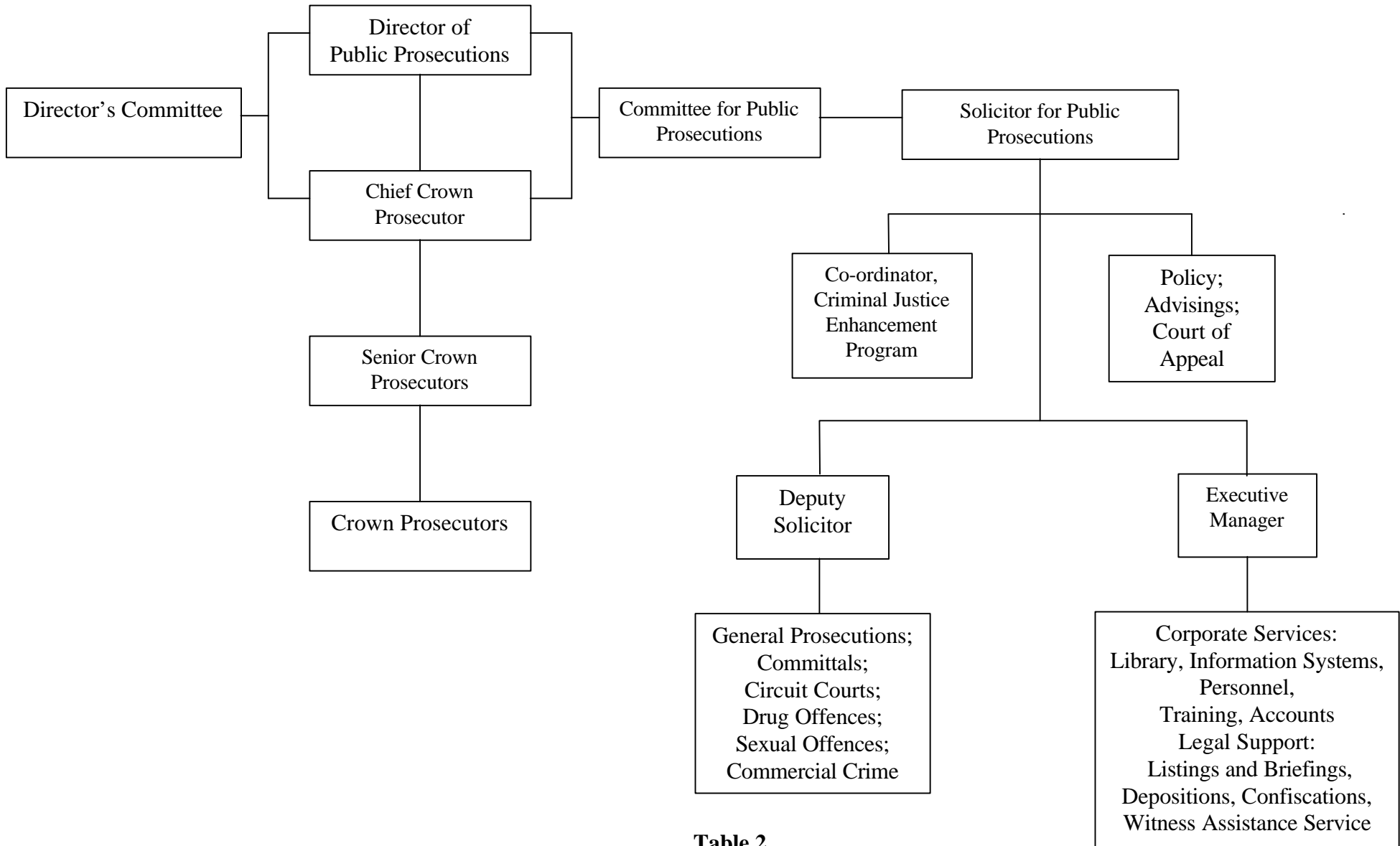


Table 2

- in any other case, the most senior Crown Prosecutor available: s 23(2).

However, the Director is not required to convene a meeting of the Director's Committee if the other two members of the Committee have informed the Director in writing that it is not necessary to do so: s 23(5).

The Director also reserves the right to make a special decision contrary to the advice of the other two members. However, on such an occasion, the Director must submit a written statement to the Attorney-General, to be laid before Parliament, setting out the decision and the reasons for it: s 23(6).

Office of Public Prosecutions and the Solicitor for Public Prosecutions

The Office is established by s 40(1) and consists of the Solicitor for Public Prosecutions and members of his or her staff. The Office's main purpose is to prepare and conduct cases in which the Director is involved: s 41.

The Solicitor manages the Office of Public Prosecutions and briefs the Crown Prosecutors to appear in proceedings on behalf of the Director: s 38(1). The Solicitor also has the status of a departmental head pursuant to the *Public Sector Management and Employment Act 1998* (Vic), and is the 'accountable officer' for the purposes of the *Financial Management Act 1994* (Vic). These arrangements enable the Director to concentrate on prosecutorial decisions.

Committee for Public Prosecutions

Separate to the Director's Committee is the Committee for Public Prosecutions, which is established by s 42 and consists of:

- Director (Chairperson);
- Chief Crown Prosecutor;
- Solicitor for Public Prosecutions;
- a person appointed by the Governor in Council.

The functions of the Committee for Public Prosecutions include:

- to advise on the effective, economic and efficient operation of the prosecutorial system;
- to assist in the co-ordination of the operations of the Director and the Office of Public Prosecutions;
- to establish guidelines on the circumstances in which certain decisions are not subject to the requirement that a Director's Committee be convened;
- to establish guidelines on the treatment of victims of crime;
- to recommend to the Attorney-General the removal from office of any Crown Prosecutor: s 43.

The Committee can give advice and guidance, but cannot issue any direction to the Director, Crown Prosecutors or Solicitor for Public Prosecutions about the exercise of their statutory functions: s 43(3).

In 1999-2000, some of the topics considered by the Committee were: statistics on the performance of Crown Prosecutors; new procedures for committals and County Court trials; comparison of barristers' fees paid by the DPP and Victorian Legal Aid; and the sufficiency of funding in light of the increase in the Office's workload.⁹⁹

Relationship between Director and Attorney-General

Section 10 clarifies that the Director is responsible to the Attorney-General but, subject to the Act, that this does not detract from the authority of the Director in the institution, preparation and conduct of proceedings.

Unlike in New South Wales, there is no explicit provision under the Act for the Attorney-General to issue guidelines or directions to the Director.

Internal organisation and consultation¹⁰⁰

The chart on p 40 demonstrates the internal structure of the Office of Public Prosecutions and its relationship with the Director.

The legal work of the Office is organised into Program Areas, such as General Prosecutions (Supreme Court, County Court, Bails, Legal Costs and so on), the Commercial Crime Group, Circuit Courts, Drug Prosecutions, Sexual Offences, Committals, Advising and Court of Appeal. Each Program Area is headed by a Program Manager.

The Executive Manager supervises the sections of the Office that provide corporate services and legal support.

Apart from the Committee for Public Prosecutions and the Director's Committee, which are imposed by the *Public Prosecutions Act*, consultation occurs in other forms. There is an Executive Management Group, comprised of the Solicitor for Public Prosecutions, the Deputy Solicitor and the Executive Manager. The Executive Management Group meets weekly and deals with budgetary, staffing, strategic and policy issues. These may have legal consequences but the Group does not focus on matters of law in a case-specific sense. Additional people may attend meetings as invitees, depending on the

⁹⁹ DPP (Victoria), *Annual Report 1999-2000*, pp 74-76.

¹⁰⁰ Information in this section was obtained through personal communication with Paul Tobin, Executive Manager, on 6 and 10 July 2001. The organisational chart on p 40 anticipates the shift of the training section and the witness assistance service from the supervision of the Solicitor for Public Prosecutions to that of the Executive Manager, which will occur in the very near future according to Mr Tobin.

business to be considered.

The Program Managers meet monthly, while the Solicitor for Public Prosecutions and the Executive Manager confer with the Director regularly in relation to the Director's briefing requirements.

9. QUEENSLAND

The *Director of Public Prosecutions Act 1984* received assent on 6 December 1984 and had commenced in its entirety by 17 January 1985. The current Director is Leanne Clare.

The Office of the DPP is part of the Criminal Justice Program of the Department of Justice and Attorney-General. The Office headquarters are in Brisbane and there are eight regional branches: Cairns, Townsville, Rockhampton, Beenleigh, Ipswich, Maroochydore, Southport and Toowoomba. The total number of staff at 30 June 2000 was 248.¹⁰¹

Appointment of Director

The Director is appointed by the Governor in Council and must be a lawyer who has been admitted to practise for not less than 10 years: s 5(1)&(1A).

The term of office is of such duration as the Governor in Council determines. The Governor in Council, upon the recommendation of the Minister, also determines the salary and conditions of employment: s 5(2). The Director is eligible for reappointment upon the expiration of the term of appointment: s 5(2)(c).

The Director's appointment may be terminated by the Governor in Council for reasons including misbehaviour, physical or mental incapacity, or contravening the restrictions on holding other employment: ss 7, 8.

Functions

The Director is entitled under s 10 to institute and conduct all criminal proceedings and appeals. In practice, the Office prosecutes indictable offences, dealt with on indictment or summarily. The Police Service handles the bulk of summary prosecutions.

Section 11 outlines the Director's powers to furnish guidelines to Crown Prosecutors, the Commissioner of Police and others. However, guidelines are not to be issued for a particular case.

Relationship to Attorney-General

The Act provides for significant authority of the Minister (currently the Attorney-

¹⁰¹ DPP (Queensland), *Annual Report 1999-2000*, p 95.

General and Minister for Justice, Rod Welford) over the Director. Section 10(2) reinforces that the Director is responsible to the Minister in the discharge of his or her functions but nothing in s 10 shall limit the authority of the Director in respect of the preparation, institution and conduct of proceedings.

Among the Director's functions is the obligation to perform such duties of a legal nature as the Minister may direct: s 10(1)(f).

Deputy Director

The Governor in Council may appoint a Deputy Director for a term not exceeding five years, although the appointment is renewable: ss 17, 19. There is currently one Deputy Director, Michael Byrne QC.

Internal management structure

The Director focuses on prosecutorial decisions and other legal issues. The Executive Director attends to corporate management, which encompasses coordinating support services, approving staffing levels, arranging the provision of training, and formulating budgetary submissions to Treasury.

Section 32 of the *DPP Act 1984* vests administrative and financial control in the 'chief executive' for the purposes of the *Financial Administration and Audit Act 1977* (Qld) and the *Public Service Act 1996* (Qld). Technically, the chief executive is the Director-General of the Department of Justice and Attorney-General, but these responsibilities have been delegated to the Executive Director. Therefore, when requests or ideas have resource implications, the ultimate decision rests with the Executive Director.

Each branch office is headed by a Legal Practice Manager, who fulfils quality assurance and supervisory duties, as well as conducting their own caseload. The Legal Practice Manager assesses whether a matter prepared by a Legal Officer should be prosecuted and, if so, signs the indictment and allocates the file to a Prosecutor or briefs private Counsel.

The Executive Director consults on an informal basis with the Director and the Legal Practice Managers. There is no specific management committee which meets regularly, although the aforementioned officers gather as a group at need, usually once or twice a year.¹⁰²

¹⁰²

The information on internal management structure was acquired through personal communication with Gary Hannigan, Executive Director of the Queensland DPP, on 4 July 2001. The Executive Management Group, referred to on p 5 of the *Annual Report 1999-2000* has been disbanded. The positions of Operations Director (North) and (South) no longer exist. The role of Special Counsel to the Appeals and Specialist Services Branch is now performed by the Deputy Director, Michael Byrne QC, who was formerly the Special Counsel.

10. SOUTH AUSTRALIA

The *Director of Public Prosecutions Act 1991* was assented to on 21 November 1991 and commenced on 6 July 1992. The current Director is Paul Rofe QC.

Appointments

The Director is appointed by the Governor and must be a legal practitioner of at least seven years standing: s 4.

The term of office is seven years, although the Director is eligible for reappointment: s 4. The conditions of the appointment are determined by the Governor.

Section 4(7) restricts the other duties in which the Director can engage while holding office. The grounds on which the Governor may terminate the Director's appointment are specified by s 4(8), including physical or mental incapacity, 'misbehaviour', or failure to comply with the requirements for disclosure of interests that conflict with the Director's duties.

The Act does not make provision for a Deputy Director. There is currently an Associate Director, Wendy Abraham QC, but this is not a position established by the Act.

Powers and functions

The powers of the Director are outlined by s 7 and extend to laying charges for and prosecuting indictable and summary offences. In practice, however, the DPP prosecutes indictable offences, while the South Australian Police conduct summary prosecutions. The current Director stated in the 1999-2000 Annual Report:

The issue of police prosecution services remains under review although the prospect of this Office taking over summary prosecutions in the foreseeable future appears to be remote for...economic and geographic considerations.¹⁰³

Unlike in New South Wales, the South Australian Director is empowered to grant immunity from prosecution: s 7(1)(f).

The Commissioner of Police must, as far as practicable, comply with any request from the Director to investigate or report on the investigation of any matter: s 10. Similarly, the Director may give directions or furnish guidelines to the Commissioner of Police or other persons investigating or prosecuting offences on behalf of the Crown: s 11. None were issued in the 1999-2000 year.¹⁰⁴

¹⁰³ DPP (South Australia), *Annual Report 1999-2000*, p 1.

¹⁰⁴ *Ibid*, p 28.

Relationship to Attorney-General

There are reciprocal duties for the Director and the Attorney-General to consult about the Director's powers or functions if the other requests it: s 8.

Section 9 declares that 'the Director is entirely independent of direction or control by the Crown or any Minister or officer of the Crown', subject to that section. The Attorney-General may, after consultation with the Director, give directions or furnish guidelines to the Director regarding his or her functions: s 9(2).

The latest Annual Report confirms that there has been no need to resort to the formal consultation procedures of the Act.¹⁰⁵

Supervisory and advisory mechanisms

The South Australian Office of the DPP is part of the Justice Department, and the Director reports to the Chief Executive of the Justice Department for administrative purposes. Although the DPP's budget is distinct, it is technically included in the expenditure of the Department, which remains responsible for preparing accounts for auditing.¹⁰⁶

The Office has an Executive Committee comprised of the:

- Director (Chair);
- Associate Director;
- Managing Solicitor;
- Managing Prosecutor;
- General Manager.

The Executive Committee meets fortnightly and has overall responsibility for policy and for the establishment, implementation and evaluation of the strategic direction of the Office. It also determines the appropriate response to important legal issues affecting the Office, for example, legislative developments.¹⁰⁷

There is also a Management Committee, the members of which are:

- General Manager (Chair);
- Managing Solicitor;
- Managing Prosecutor;
- the two Senior Solicitors (who manage the two sections into which solicitors are

¹⁰⁵ Ibid, p 25.

¹⁰⁶ Ibid, p 25.

¹⁰⁷ Ibid, p 5.

- grouped);
- the two Senior Prosecutors;
 - Manager of the Witness Assistance Service;
 - Administration Manager.

The Management Committee meets monthly and is responsible for operational matters such as accommodation, information technology, staffing, financial proposals, co-ordination of business planning, performance management and enterprise bargaining. The Management Committee is required to forward recommendations on some topics to the Executive Committee for final approval.¹⁰⁸

11. WESTERN AUSTRALIA

The Office was established by the *Director of Public Prosecutions Act 1991*, which received assent on 21 June 1991 and commenced on 3 February 1992. The current Director is Robert Cock QC. The Office was staffed by 116 full-time employees in 1999-2000.¹⁰⁹

Appointment of Director

The Governor appoints the Director. The term of office is five years but the Director may be reappointed for one or more terms: cl 1 of Schedule 1 to the Act. The Director must be a legal practitioner of not less than eight years standing and practice: s 5(2). The conditions of service are contained in Schedule 1 to the Act.

Some of the grounds for removing the Director from office are misbehaviour, incompetence, and physical or mental incapacity that impairs the performance of the Director's functions, other than a temporary illness. Unlike the South Australian or Queensland legislation, cl 6(2) of Schedule 1 gives examples of misbehaviour: engaging in other employment without the Governor's approval, failure to disclose pecuniary interests, and 'conduct that renders the Director unfit to hold office as Director notwithstanding that the conduct does not relate to any function of the office'.

The Director is also the Chief Executive Officer for the purposes of the *Public Sector Management Act 1994*.

Functions and powers

Part 3 of the *DPP Act* allocates the Director carriage of indictable offences, related proceedings, and indictable offences dealt with summarily: ss 11-16. Otherwise, the Act does not make provision for the DPP to conduct summary prosecutions, which are

¹⁰⁸ Ibid, p 5. The currency of the information in the *Annual Report* about internal committees was confirmed with Rosemary Markotic, General Manager, on 9 July 2001.

¹⁰⁹ Office of the DPP (Western Australia), *Annual Report 1999-2000*, p 18.

currently handled by the police.¹¹⁰

Section 20(1) provides a general power to 'do all things that are necessary or convenient to be done for the purpose of performing the functions of the Director'.

Specifically, the Director may grant an indemnity from prosecution or give an undertaking that a disclosure made by a person will not be used in evidence against the person: s 20(2). Section 22 authorises the Director to make requests to the Commissioner of Police and other officials. Under s 24, the Director may issue a 'statement of guidelines intended to be followed in the performance of the Director's functions'.

Relationship to Attorney-General

Part 4 deals with the relationship between the Director and the Attorney-General. The reciprocal duties of the Director and Attorney-General to consult at each other's request are found in s 26.

Section 25 grants the Director a general freedom from direction by the Attorney-General or any other person, in carrying out the Director's activities, except as provided in Part 4. However, s 27 enables the Attorney-General, after consultation with the Director, to issue directions to him or her about general policy but not in an individual case: s 27(2).

There is also provision under s 27(1) for the Director to request the Attorney-General to issue directions concerning a function of the Director, and this may extend to a particular case: s 27(3). The Attorney-General does not have to comply with such a request, whereas the Director shall comply with any direction given by the Attorney-General pursuant to s 27.

If the Attorney-General performs an action that is vested in both the Attorney-General and the Director, the Director shall not act inconsistently without the consent of the Attorney-General: s 28.

So far, it has not been necessary to resort to this process of formal consultation between the Director and Attorney-General 'because there is free and frank communication both ways, as necessary.'¹¹¹

¹¹⁰ The transfer of summary prosecutions to the DPP was intended by the Western Australian Coalition Government, with the introduction of *The Director of Public Prosecutions Amendment Bill 2000*. The Bill provided that the DPP would prosecute 'prescribed summary offences', to be determined by an arrangement between the Director and the Police Commissioner. The Bill was read for a second time in the Legislative Assembly on 21 March 2000 by the Minister of Police. However, the Coalition lost power at the State election in February 2001.

¹¹¹ Office of the DPP (WA), *Annual Report 1999-2000*, p 23. The Director notes that his 'friendly and cordial' relationship with the Attorney-General has been maintained during the reporting year.

Section 29 obliges the Director ‘so far as the interests of justice allow’ to furnish as much information relating to the functions of the Director as the Attorney-General requires ‘for the proper conduct of the Attorney General’s public business’, and to enable Parliament to be informed about the operations of the Director or the *DPP Act*. John McKechnie QC, the former Western Australian Director, observed that this provision enables Parliament to seek an explanation for a decision but not to exert influence before it is made.¹¹²

Relationship to Deputy Director

The position of Deputy Director is created by s 4. Subject to the direction and control of the Director, the Deputy Director may perform the functions of the Director under the Act: s 6. At present there is no Deputy Director appointed.

Internal structure and advisory mechanisms

The legal and support staff of the WA DPP are organised into teams. Each team is assigned a Team Consultant, being a senior lawyer who provides professional leadership and guidance to members of the team, especially on matters of law and evidence. The Team Consultants are also authorised to sign indictments and *nolle prosequi* (no bills) and advise on the appropriateness of Crown appeals.

In addition, each team has a Team Manager, who is an experienced lawyer but not as high in status as the Team Consultant. The Team Managers provide instruction to both legal and clerical staff.

There are two internal bodies of note. The Operations Committee is comprised of the Team Managers and the Executive Officer. It formulates and implements office practices and procedures.

The Corporate Executive has responsibility for the corporate management of the office. Its members include the Director, the Assistant Principal Crown Prosecutor, several senior lawyers and the Executive Officer.¹¹³

¹¹² McKechnie, n 41, p 128.

¹¹³ The information on internal structure and advisory mechanisms was derived from: Office of the DPP (WA), *Annual Report 1999-2000*, p 20; and personal communication with Jeff Plunkett, Executive Officer of the WA DPP, 13 June 2001. The Executive Officer’s duties include those of a business manager. The position is similar to that of the Manager of Corporate Services in the NSW DPP. The term ‘senior lawyer’ has been used in describing staff structure, to avoid confusion with the NSW concept of a Crown Prosecutor. In WA, all DPP lawyers are called Crown Prosecutors and are appointed under Part 3 of the *Public Sector Management Act 1994* (WA). By contrast, the Crown Prosecutors at the NSW DPP are statutory appointees under their own *Crown Prosecutors Act 1986* and are counsel to the Director.

12. TASMANIA

The position of Director of Public Prosecutions was established in Tasmania in 1986.¹¹⁴ The Office is part of the Department of Justice and Industrial Relations. The present Director is Timothy Ellis.

Appointment of Director

The Governor appoints the Director, who must be a legal practitioner of not less than seven years' standing: s 4 of the *DPP Act 1973*. The Director 'holds office during good behaviour on such terms and conditions as the Governor determines': s 5.

The Governor may remove the Director due to incapacity, misbehaviour (not defined), bankruptcy and other grounds under s 10. Engaging in other employment is restricted by s 11.

There is no provision for a Deputy Director under the Act.

Functions

The role of the Director is outlined by s 12 in broad terms, encompassing the conduct of any criminal proceedings and 'such other functions ordinarily performed by a practitioner as the Attorney-General directs or requests'. There is no differentiation between indictable and summary proceedings and no mention of a power to grant indemnities.

In practice, the DPP appears in criminal trials in the Supreme Court, confiscations, all appeals, and represents the State of Tasmania in civil actions - predominantly personal injury and workers' compensation litigation.¹¹⁵ The DPP also deals with summary prosecutions for breaches of statutory standards, for example against workplace safety legislation. Summary criminal offences are prosecuted by the police in the Courts of Petty Sessions.

Section 16(2) provides that the Governor may make regulations to stipulate the manner in which the Director may issue advice, and the circumstances that require a police officer or other prescribed person to give the Director information.

Relationship to Attorney-General

¹¹⁴ The *Crown Advocate Amendment Act 1986* amended the *Crown Advocate Act 1973* to reconstitute the Crown Advocate as the Director of Public Prosecutions. It is for this reason that the relevant legislation is entitled the *Director of Public Prosecutions Act 1973* although the DPP did not exist until 1986.

¹¹⁵ DPP (Tasmania), *Annual Report 1999-2000*, pp 1 and 4 of the electronic version on the Department of Justice website at <<http://www.justice.tas.gov.au/cl/DPPAR99.htm>>

The Director may not take over, continue, or discontinue proceedings that have been undertaken by the Attorney-General (or the Solicitor-General) without his or her approval: s 12(2).

The Attorney-General may also direct the Director: to give advice and assistance to a person concerned with the conduct of any criminal proceedings, to act as counsel for any person, to have carriage of proceedings other than criminal proceedings, or to perform other functions of a practitioner: s 12(1)(b),(c),(e),(f).

Unlike the DPP legislation in New South Wales, South Australia, Western Australia and the Territories, the Tasmanian Act does not have a specific section dealing with consultation between the Director and the Attorney-General.

Advisory mechanisms

There are no official or formal internal advisory committees. However, three Principal Crown Prosecutors constitute an informal committee which meets to assist the Director in the organisation of prosecutorial tasks. The committee deals largely with operational matters such as assigning the court lists and circuit work, but may also consider the continuation of prosecutions and other legal questions.¹¹⁶

13. AUSTRALIAN CAPITAL TERRITORY

The Office of the DPP was established in the Australian Capital Territory by the *Director of Public Prosecutions Act 1990*, which had commenced in entirety by 1 July 1991. The current Director is Richard Refshauge SC.

Appointments

The Director is appointed by the Executive¹¹⁷ for a period specified in the instrument of appointment, not exceeding seven years, but is eligible for reappointment: s 22.

There is currently a Deputy Director, Ken Archer, but that position is not created under the Act.

Functions and powers

The functions of the Director are outlined by Division 2 of Part II of the Act, and span the conduct of prosecutions for summary offences, and for indictable offences on indictment or summarily: s 6(1).

¹¹⁶ Personal communication, Michael Stoddart, Principal Crown Prosecutor, Tasmanian DPP, 8 June 2001.

¹¹⁷ Section 3A of the *Administration Act 1989* (ACT) provides that where an Act confers a power or imposes a duty on the Executive, it may be carried out by two Ministers acting in concert.

In practice, the DPP prosecutes both indictable and summary offences against Territory law; prosecutes offences against Commonwealth law arising out of ACT law enforcement activities, pursuant to an agreement with the Commonwealth DPP; recovers proceeds of crime; pursues civil remedies relating to criminal offences and tax liabilities; and conducts appeals.¹¹⁸

The Director has the power to give an undertaking that a disclosure made by a person will not be used in evidence against that person: s 9. Directions or guidelines may be issued by the Director to police and others, and may be of a general nature or on a specific case: s 12. The Director is to be provided with information (s 13) or may request assistance (s 14) under certain circumstances.

Relationship to Attorney-General

The Attorney-General and the Director shall, if requested by the other, consult with regard to the performance of the Director's functions: s 19.

Section 20 provides that the Attorney-General may, after consulting the Director, give directions or furnish guidelines to the Director. These may relate, for example, to the circumstances in which the Director should institute or conduct prosecutions, or the granting of undertakings. A direction or guideline is to be of a general nature and shall not refer to a particular case.

Section 21 states that nothing in the Act shall be taken to affect the Attorney-General exercising a function or power conferred on the Attorney-General by a law of the Territory.

Internal committee

There is a Management Committee, comprised of:

- Director;
- Deputy Director;
- Resource Manager;
- Manager, Magistrates Court - head of the summary prosecution section;
- Manager, Supreme Court - head of the indictable offences section.

The Committee meets approximately monthly and deals with operational issues such as staffing, training, accommodation and finances. It does not advise the Director on legal matters.¹¹⁹

¹¹⁸ DPP (ACT), *Annual Report 1999-2000*, pp 4-5.

¹¹⁹ Personal communication, Ken Archer, Deputy Director, ACT DPP, 14 June 2001.

14. NORTHERN TERRITORY

The *Director of Public Prosecutions Act 1990* received assent on 15 June 1990 and commenced on 21 January 1991. The current Director is Rex Wild QC. The head office of the Northern Territory DPP is in Darwin, with a regional office in Alice Springs.

Appointment of Director

The Director is appointed by the Administrator of the Northern Territory and must have been enrolled as a legal practitioner of the High Court or any Supreme Court of the Commonwealth for not less than 10 years: s 4(1).

The period of office is ‘for such period as is specified in the instrument of appointment or without limitation on the period of office’: s 4(1).

The usual restriction on engaging in other employment is provided in s 4(5), and the Director must disclose certain interests in accordance with s 6. Removal from office, under s 8, is on the grounds of incapacity, misbehaviour (not defined), or bankruptcy.

Functions and powers

The powers of the Director are outlined in Part III of the Act and include to prosecute indictable offences on indictment or summarily, to prosecute summary offences, and to conduct appeals: ss 12-14.

The actual prosecuting arrangements are somewhat more complex. The DPP prosecutes indictable offences in the Supreme Court and Courts of Summary Jurisdiction; there is no District or County Court. A ‘Memorandum of Understanding’ between the Director and the Commissioner of Police gives the Director responsibility for all summary prosecutions in Darwin and Alice Springs. The Summary Prosecutions unit is comprised of legal practitioners contracted to the DPP, members of the NT Police attached to the DPP, and public sector employees. Defended summary matters are conducted exclusively by legal practitioners. All the members of Summary Prosecutions are subject to the guidance of the Director but the budget is funded by the NT Police Force. Outside of Darwin and Alice Springs, police prosecutors deal with most summary offences, although DPP lawyers are sent to attend to some matters.¹²⁰

The Director may grant an indemnity or give an undertaking: s 21. Section 23 empowers the Director to request information from an official whose duties include prosecuting or investigating offences: s 23. An ‘official’ is defined broadly under s 23(4). The Director may also issue a statement of guidelines intended to be followed in the performance of the Director’s functions: s 25.

¹²⁰ Personal communication, Rex Wild QC, NT Director of Public Prosecutions, 11 June 2001; and DPP (NT), *Annual Report 1999-2000*, pp 71-76. The Memorandum of Understanding was executed on 11 February 1998. A copy is contained in the *Annual Report* at p 77.

Relationship to Deputy Director

Section 10 enables the appointment of a Deputy Director and the position is presently held by Jack Karczewski. The Deputy may exercise the powers of the Director, subject to his or her direction and control: s 10(2).

Relationship to Attorney-General

Except as provided in the Act, the Director is not subject to direction by the Attorney-General in the performance of the Director's functions: s 26.

The reciprocal rights of the Attorney-General and Director to consult each other are found at s 27. After consultation with the Director, the Attorney-General may issue to the Director written guidelines on the general policy to be followed in the performance of a function of the Director, but not in relation to an actual prosecution: s 28. The Director may request directions, even on a particular case.

The Director shall not act inconsistently when the Attorney-General exercises a capacity that is vested in both of them: s 29.

Section 30 obliges the Director to supply to the Attorney-General information relating to the Director's activities when required for the 'proper conduct of the Attorney-General's public business' or to enable the Legislative Assembly to be informed or Members' questions to be answered. The same provision appears in the Western Australian legislation.

Since the establishment of the Office there has been no instance of the Attorney-General exerting his authority in an area where there is concurrent jurisdiction. Rather, the Director has consulted with the Attorney-General on a regular, informal basis.¹²¹

Advisory structures¹²²

An Executive Committee meets on a weekly basis and its members are:

- Director;
- Deputy Director;
- General Counsel;
- a Senior Crown Prosecutor;
- the Officer-in-Charge of Summary Prosecutions in Darwin and Alice Springs - both are Senior Sergeants in the NT Police;
- the Senior Crown Prosecutor in charge of the Alice Springs office.

¹²¹ DPP (NT), *Annual Report 1999-2000*, p 59.

¹²² Personal communication, Rex Wild QC, NT Director of Public Prosecutions, 11 June 2001, and Shane McGrath, Senior Research Solicitor, 8 June 2001.

Additional Crown Prosecutors of ‘middle’ or ‘junior’ status participate in the Committee on a rotational basis. The Executive Committee examines a range of subjects including liaison with other agencies, court delays, and legal questions.

Sub-committees are also convened as required on various types of offences or legal issues, such as police powers, bail, and sexual assault. Most of the sub-committees are of limited duration and consist of Crown Prosecutors, although the sexual assault sub-committee is a standing committee and features non-lawyers.

15. COMMONWEALTH

The majority of Commonwealth prosecutions relate to drug importation in contravention of the *Customs Act 1901*, offences against the *Corporations Law*, and fraud upon the Commonwealth such as tax and social security fraud.¹²³

The *Director of Public Prosecutions Act 1983* received assent on 14 December 1983 and commenced on 5 March 1984. The present Director is Damian Bugg QC.

The head office of the Commonwealth DPP is in Canberra. It coordinates activities across Australia and is responsible for the prosecution of Commonwealth offences in the ACT and related criminal assets proceedings. Regional offices, located in the capital city of each State and Territory, conduct prosecutions and recovery actions in their respective area.¹²⁴ In addition, the Brisbane office has sub-branches in Townsville and Cairns. At 30 June 2000, the staff totalled 403 people.¹²⁵ The budget in 1999-2000 was approximately \$56.18 million.¹²⁶

Appointment of Director

Section 18 stipulates that the Director shall be appointed by the Governor-General and must have been a legal practitioner for not less than five years. The term of office is for a period specified in the instrument of appointment, not exceeding seven years, but the Director is eligible for re-appointment. The present Director was appointed for five years, commencing in August 1999.¹²⁷

The Director is restricted from undertaking other work by s 22, and may be terminated by the Governor-General for misbehaviour (not defined), incapacity, bankruptcy, and not

¹²³ Commonwealth DPP, *Annual Report 1999-2000*, p 1. Note that drug possession, supply and manufacture are offences against State law, eg. *Drug Misuse and Trafficking Act 1985* (NSW).

¹²⁴ Ibid, pp 3-4.

¹²⁵ Ibid, p 34.

¹²⁶ Ibid, p 38.

¹²⁷ Ibid, p 1.

complying with the employment restrictions or the duty under s 24 to disclose pecuniary interests: s 23.

Functions and powers

The functions and powers of the Director are outlined by ss 6 and 9. The role of the Director is chiefly to prosecute indictable and summary offences against the laws of the Commonwealth, and to recover the proceeds of Commonwealth crime. Other assorted activities include conducting committals, extradition proceedings, and summary prosecutions for offences against State law where a Commonwealth officer is the informant.

The Director may give directions or guidelines concerning the prosecution of Commonwealth offences, to the Commissioner of the Australian Federal Police, the Chief Executive Officer of the Australian Government Solicitor and other persons specified by s 11. Directions or guidelines may be issued on a particular case: s 11(2). The power of the Director to give undertakings is found at s 9(6)-(6F).

Relationship to Attorney-General

Section 7 provides that the Director and the Attorney-General shall consult if requested by the other, on matters concerning the performance of the Director's functions.

After consultation with the Director, the Attorney-General may furnish the Director with guidelines and directions: s 8. Without limiting their potential scope, s 8(2) states that they may relate to the circumstances in which the Director should institute or continue prosecutions, the granting of undertakings, or to particular cases. No directions were issued by the Attorney-General during 1999-2000.¹²⁸

Section 10 confirms that the Director's operations do not affect those of certain other people, including the Attorney-General, persons appointed by the Governor-General, or a person acting as a Special Prosecutor under the *Special Prosecutors Act 1982*.

Relationship to Associate Director

There is a position of Associate Director, whose conditions of appointment are the same as the Director: s 18A. Section 18B(1) grants the Associate Director all the capacities of the Director, subject to any directions of the Director and excluding the Director's power of delegation under s 31. The statutory position of Associate Director is currently not being used. Rather, there is a First Deputy Director.

Management structure and internal committees

The Director is supported by the First Deputy Director; the Principal Advisor,

¹²⁸ *Ibid*, p 1.

Commercial Prosecutions and Policy; and a team of Deputy Directors. The head office in Canberra has a Deputy Director, Legal and Practice Management, and a Deputy Director, Corporate Management. Deputy Directors are also located in the State capitals, except for Hobart and Darwin which each have an Assistant Director.¹²⁹

The Deputy Directors in charge of the Sydney, Melbourne and Brisbane offices are assisted by their own individual Senior Management Committee which meets on a regular basis. No formal committee structure operates within the other branch offices.

In head office, an informal group of the senior managers assists and advises the Director. Conferences are also held twice a year, attended by the Director, the Deputy or Assistant Director of each regional office and the Deputy Directors from head office. The conferences have a formal agenda and involve discussion of policy and management issues, strategic reviewing and planning.¹³⁰

A Best Practice Review Committee evaluates the operation of every Commonwealth DPP branch, and is comprised of representatives from head and regional offices. The purpose of the Committee is to identify best practices within the organisation and share the benefits of the experiences gained in each location.¹³¹

Commonwealth Parliamentary Committees

There is no committee in the Commonwealth Parliament that focuses solely on the Commonwealth DPP. Rather, the DPP is within the general scope of two Standing Committees: the Legal and Constitutional Legislation Committee in the Senate, and the Legal and Constitutional Affairs Committee in the House of Representatives.

Senate¹³²

The Legal and Constitutional Legislation Committee is one of eight Legislative and General Purpose Standing Committees in the Senate. It is responsible for the Attorney-General's Department, the Department of Immigration and Multicultural Affairs and the Australian Customs Service. The portfolio of the Attorney-General's Department includes the Commonwealth DPP, Commonwealth Ombudsman, Australian Government Solicitor and other legal entities.

The Legal and Constitutional Legislation Committee is subdivided into a References

¹²⁹ Ibid, p 5.

¹³⁰ Personnel communication, Stella Walker, Deputy Director Corporate Management, Head Office, Commonwealth DPP, 15 June 2001.

¹³¹ Commonwealth DPP, *Annual Report 1999-2000*, p 4.

¹³² Information on the Senate Committees is from the Senate component of the Commonwealth Parliament website at <<http://www.aph.gov.au/senate>> unless otherwise stated.

Committee and a Legislation Committee: Standing Order 25(1).¹³³ Although the Committees are separate, they may meet to confer on any matter referred to either Committee and to coordinate their work where necessary: Standing Order 25(9).

The References Committee inquires into and reports on various subjects referred to it by the Senate, excluding matters sent to the Legislation Committee: Standing Order 25(2)(a). A reference to the Committee is on notice of motion by a Senator. The References Committee could, therefore, investigate the operations of the Commonwealth DPP.

The Legislation Committee undertakes a range of functions. It examines bills or draft bills referred to it by the Senate, monitors the performance of departments allotted to it, and considers the annual reports of those departments: Standing Order 25(2)(b). The Committee also inquires into and reports on estimates of expenditures, as previously done by Estimates Committees. The estimates take place in a three-staged process each year, beginning with estimates based on the appropriation bills introduced into Parliament as part of the Budget in May, followed by supplementary estimates and additional estimates. These broad powers would enable the Legislation Committee to consider the DPP's output, any relevant legislation, annual reports of the DPP, and its budget.

House of Representatives¹³⁴

The Standing Committee on Legal and Constitutional Affairs is one of nine General Purpose Standing Committees appointed at the commencement of each Parliament. It is empowered to inquire into and report on any issues referred to it by either the House or a Minister, including a pre-legislative proposal, bill, motion, petition, report, or financial matter: Standing Orders 323-324.¹³⁵ The Committee covers the Attorney-General's portfolio, which encompasses the DPP, Federal Court, Australian Federal Police, Australian Security Intelligence Organization and so on.¹³⁶

¹³³ Commonwealth of Australia, The Senate, *Standing Orders and Other Orders of the Senate*, Senate Printing Unit, Canberra, February 2000, Chapter 5: Standing and Select Committees. The same format of subdivision into a References Committee and a Legislation Committee has applied to each of the Legislative and General Purpose Standing Committees in the Senate since October 1994.

¹³⁴ Information in this subsection is from the House of Representatives component of the Commonwealth Parliament website at <<http://www.aph.gov.au/house>>

¹³⁵ Parliament of Australia, House of Representatives, *Standing and Sessional Orders*, as at 6 February 2001, Chapter XXIV: Standing Committees and Chapter XXV: Operation of Committees. The latest version of the Standing Orders is available electronically on the House of Representatives component of the Commonwealth Parliament website at <<http://www.aph.gov.au/house/pubs/standos/index.htm>>

¹³⁶ Schedule of Allocation to Committees of Annual Reports of Departments, Agencies, Authorities and Companies, presented by the Speaker of the House of Representatives, *CPD(HR)*, 9 December 1998, p 1732. In addition, the portfolio of the Prime Minister and Cabinet is allocated to the Committee. Departments which are allocated to other Committees but are also referred to the Standing Committee on

16. UNITED KINGDOM¹³⁷

16.1 Before 1986

Prior to 1986, the police were responsible for the bulk of prosecutions in England and Wales. Most police forces had a solicitors' department staffed by qualified lawyers, and the police assumed the role of a client, expecting matters to be prosecuted if there was a *prima facie* case.¹³⁸ The position of a public prosecutor was introduced by the *Prosecution of Offences Act 1879* (UK) but the Director was initially part of the Home Office and only dealt with a small number of important or difficult cases. A separate office was created by the *Prosecution of Offences Act 1908* (UK).

In 1978, a Royal Commission on Criminal Procedure was conducted by Sir Cyril Philips. The report of the Philips Commission, published in 1981, recommended that an independent prosecution authority be established by an Act of Parliament. The Commission expressed concern at the lack of a consistent prosecution policy across the country and at the high rate of acquittals.¹³⁹ The acquittal rate was contributed to by police pursuing 'weak' cases and by the fact that the Attorney-General had the sole power to stop a prosecution once it had commenced.

In 1983 the Home Office published a White Paper on *An Independent Prosecution Service for England and Wales*. The paper advocated a national prosecution service, handling the majority of cases in local offices to prevent delays in decision-making. By contrast, the Philips Commission favoured a service for each police area, fearing that centralisation would create a large, slower bureaucracy. But the government was concerned about the risk of local interference under the Commission's proposal.¹⁴⁰

Legal and Constitutional Affairs are the Human Rights and Equal Opportunity Commission, and the Commonwealth and Defence Force Ombudsman.

¹³⁷ The information on the United Kingdom is based on (i) general commentary from the Crown Prosecution Service website at <<http://www.cps.gov.uk>>; (ii) Crown Prosecution Service, *Annual Report 1999-2000*, The Stationery Office, London - available on the CPS website; and (iii) the Home Affairs Select Committee component of the House of Commons website at <<http://www.parliament.uk/commons/selcom>>. As most of the data overlaps between these sources, it is only footnoted when it is unique to one of them or came from a different location.

¹³⁸ In 1981, 32 of the 43 police forces of England and Wales had a solicitors' department, with the number of solicitors ranging from 4 to 60 and averaging 20: K Lidstone, 'The Reformed Prosecution Process in England: A Radical Reform?' (1987) 11 *Criminal Law Journal* 296 at 298.

¹³⁹ Between 1979 and 1982 the average acquittal rate in cases where the defendant pleaded not guilty in the Crown Court was 49%. *Ibid*, p 298.

¹⁴⁰ F Bennion, 'The New Prosecution Arrangements' [1986] *Criminal Law Review* 3 at 10.

16.2 Prosecution of Offences Act 1985

The Act established the Crown Prosecution Service, of which the Director of Public Prosecutions is the head: s 1(1). All the sections of the Act relevant to the discussion below had commenced by 1 October 1986.

Appointment

The Director is appointed by the Attorney-General and must have a 10 year 'general qualification', defined as 'a right of audience in relation to any class of proceedings in any part of the Supreme Court, or all proceedings in county courts or magistrates' courts': s 2 of the *Prosecution of Offences Act*; s 71 of the *Courts and Legal Services Act 1990*. Between 1879 and the *Prosecution of Offences Act* in 1985, the Director was appointed by the Home Secretary, not the Attorney-General.

Functions and powers

Section 3(2) of the *Prosecution of Offences Act* stipulates that it is the Director's duty to conduct all criminal proceedings instituted on behalf of the police, and any criminal proceedings where the importance or difficulty of the case or some other factor makes it appropriate. It is also the role of the Director to appear in appeals (s 3(2)(f)) and to furnish advice to the police on any matter relating to criminal offences (s 3(2)(e)). There is limited scope for a person to bring a prosecution privately under s 6.

The Director is required to issue a Code for Crown Prosecutors, giving guidance on general principles to be applied by them to determine what charges to prefer, whether proceedings for an offence should be instituted or discontinued, and so on: s 10.

Relationship to Attorney-General

The Director's subordinate status to the Attorney-General is clear from s 3(1) which provides that the Director 'shall discharge his functions...under the superintendence of the Attorney-General.'

The Attorney-General may make regulations requiring the chief officer of a police force to supply information to the Director about a prescribed kind of offence or 'such cases or classes of case' as the Director may specify: s 8.

Unlike most DPP legislation in Australia, there are no explicit provisions in the Act obliging the Director and the Attorney-General to consult in certain circumstances, authorising the the Attorney-General to issue guidelines to the Director, or precluding the Director from acting inconsistently to the Attorney-General.

Section 9, which sets out the procedure for the Director to produce the Annual Report and the Attorney-General to lay it before Parliament, also states: 'The Director shall, at the request of the Attorney General, report to him on such matters as the Attorney General may specify.'

16.3 Crown Prosecution Service

The Crown Prosecution Service (CPS) was fully operational throughout England and Wales by 1 October 1986.¹⁴¹ It prosecutes cases in the Magistrates' Courts, Crown Courts and higher courts, covering summary and indictable offences, appeals and other related proceedings. In 1999-2000 the CPS conducted 1.4 million prosecutions in the Magistrates' Courts and 125,000 cases in the Crown Courts.¹⁴² There are around 5400 staff in the CPS, comprising 2100 lawyers and 3300 caseworkers and administrative staff.¹⁴³ The CPS's expenditure in 1999-2000 was approximately £312 million.¹⁴⁴

The headquarters of the CPS are in London and York. The headquarters provide a national framework, formulate standards, support the branches with advice, contribute to shaping the government's criminal justice policy, and liaise with key government departments.

A review of the CPS by Sir Ian Glidewell, hereafter referred to as the Glidewell Report, was published in June 1998.

Geographical organisation

The CPS is geographically organised into Areas, as required by s 1(4) of the *Prosecution of Offences Act*. On 1 April 1999, the CPS adopted its current 42 Area structure, increasing the number of Areas to align with police force boundaries and thereby improve inter-agency co-ordination. Each Area is headed by a Chief Crown Prosecutor, who is accountable to the Director for legal decisions and casework, and to the Chief Executive for efficient, economic management of the Area. The Chief Crown Prosecutor is supported by an Area Business Manager.

London Area has a somewhat different arrangement, as it encompasses both the Metropolitan Police and the City of London Police. CPS London has three Assistant Chief Crown Prosecutors, one for each of the three Metropolitan Police areas.

¹⁴¹ The introduction of the CPS in a selection of counties began from 1 April 1986: Lidstone, n 138, p 296.

¹⁴² CPS, *Annual Report 1999-2000*, London, The Stationery Office, p 6. The report can be accessed on the CPS website at <<http://www.cps.gov.uk>>. The Magistrates' Court exercises summary jurisdiction. The Crown Court deals with trials on indictment, appeals from Magistrates and cases committed to the court for sentence. Appeals from trials in the Crown Court are to the Court of Appeal (Criminal Division). The Crown Court dates from 1972 and its jurisdiction was previously exercised by the Assize Courts and Courts of Quarter Sessions: R Bird, *Osborn's Concise Law Dictionary*, 7th edition, Sweet & Maxwell, London, 1983, pp 104, 211.

¹⁴³ Personal communication, Dan Krista, CPS Correspondence Unit, 31 May 2001. Caseworkers are non-legal staff who are designated to review and present selected casework before the Magistrates' Court.

¹⁴⁴ This figure includes the separate but allied Serious Fraud Office: CPS, n 142, p 31.

Within an Area, one or more Branch offices handle prosecutions on a local basis under the leadership of the Branch Crown Prosecutor.

On a broader scale, the Areas are collected into 10 regions called ‘family groups’. These correspond to the nine Government Office Regions of England, plus Wales.

Management structure

The structure of the CPS reflects a separation between legal and management responsibilities.

The head of the CPS is the Director of Public Prosecutions, David Calvert-Smith QC. He is assisted by a Director of Casework and a Director of Policy.

The post of Chief Executive was created in 1998 to enable the Director to concentrate on the legal process.¹⁴⁵ The current Chief Executive is Mark Addison.

The Director’s Board is comprised of:

- Director;
- Chief Executive;
- Director of Casework;
- Director of Policy;
- Director of Human Resources.

These five officers are often called the Directors of Headquarters or the five functional Directors.

The CPS Board

In 1999 the Director convened an additional board, referred to as the CPS Board or the Director’s Strategic Board, to assist him and the Chief Executive to discharge their accountabilities and the statutory and management functions of the CPS. The members of the CPS Board are:

- the five Directors of Headquarters (ie. Director of Public Prosecutions, Chief Executive, Director of Policy, Director of Casework, Director of Human Resources);
- Chief Crown Prosecutor for London;
- nine other Chief Crown Prosecutors, representing the ‘family groups’;
- Chief Inspector of the CPS Inspectorate;
- Head of Communications;
- Head of Strategic Planning;
- two ‘non-executive directors’ who were appointed in January 2000 from outside

¹⁴⁵ Ibid, p 6.

organisations.¹⁴⁶

Crown Prosecution Service Inspectorate

The CPS Inspectorate was established in January 1996, originally as an integral part of the CPS, located in the Directorate of Casework. Its first fully operational year was 1997-1998.

The purpose of the Inspectorate is 'to promote the efficiency and effectiveness of the Crown Prosecution Service through a process of inspection and evaluation; the provision of advice; and the identification and promotion of good practice.'¹⁴⁷ Its duties include to conduct inspections in each CPS Area and make recommendations for improvement in the quality of decision-making.

The Glidewell Report advocated that the Inspectorate should have greater independence and wider terms of reference. In response, the Government decided to put the CPS Inspectorate on an independent statutory footing. The *CPS Inspectorate Act 2000*, which commenced on 1 October 2000, created the position of the Chief Inspector of the CPS who is appointed by and reports to the Attorney-General.

The Inspectorate also changed its program of inspections to complement the restructure of the CPS into 42 Areas. The revised procedures involve:

- a cycle of inspections every two years rather than four years, at the request of the Director and the Chief Executive. With 42 Chief Crown Prosecutors reporting to the Director, and no intermediate tier of management, the inspection process is a major indicator of the quality of casework and performance in the CPS Areas;
- extending the inspections beyond a preoccupation with the quality of casework decisions and handling, to the assessment of support work. Consequently, the Inspectorate will base its examinations on non-legal themes in addition to the existing legal themes.

The inspection program was temporarily suspended when the CPS Areas were restructured, but recommenced on a phased basis in November 1999 with inspections of Dorset and Merseyside Areas. The full program entails multiple inspections at any given time. The Inspectorate moved to separate accommodation partly to reinforce its independent status.

At the request of the Attorney-General, the Chief Inspector is also developing the use of 'lay inspectors' to enable members of the public to participate in the inspection process. The lay inspectors will look at the way the CPS relates to the public through its external communications, its dealings with victims and witnesses, complaint-handling procedures,

¹⁴⁶ Ibid, p 8.

¹⁴⁷ Ibid, p 9.

and interpretation of the ‘public interest’ test in the Code for Crown Prosecutors.¹⁴⁸

Another recommendation of the Glidewell Report was that the Inspectorate enhance its program of thematic reviews. During 1999-2000, the Inspectorate conducted three thematic reviews and released accompanying reports on: advocacy and case presentation, duties of disclosure in relation to unused material, and the CPS’s compliance with its own performance indicator regime.¹⁴⁹

16.4 Home Affairs Committee

The Home Affairs Committee is a Select Committee of the House of Commons.¹⁵⁰ Its powers under Standing Order 152 include to examine the administration and expenditure of the Crown Prosecution Service ‘excluding individual cases and appointments and advice given within government by Law Officers’.¹⁵¹

The Minutes of Evidence of the Home Affairs Committee provide an insight into the types of questions that the Director and the Chief Executive of the DPP are asked by Committee members. It is apparent that the Committee’s interest in certain subjects has been triggered by a prominent or controversial case. The Committee members may not have the power to influence the Director’s determinations, but they do make observations on individual cases and the exercise of the decision to prosecute, as the following extract from the Minutes of Evidence of 9 May 2000 demonstrates:

Mr Howarth (Committee Member):

46. ... There was a specific case which I wish to raise...and that is the case of the proprietor of Harrods, Mr Fayed. I have been told by the Attorney-

¹⁴⁸ UK Parliament, Select Committee on Home Affairs, Minutes of Evidence, *The Establishment of the CPS Inspectorate*, para 2.6, at <<http://www.publications.parliament.uk/pa/cm199900/cmselect/cmhaff>>

¹⁴⁹ Ibid, paras 2.5 and 2.8.

¹⁵⁰ Most Select Committees are appointed by Standing Order, and the members are nominated by the House. Select Committees have the power to send for persons, papers and records but cannot order the attendance of Members of Parliament or demand records and documents from government departments. See ‘The Committee System of the House of Commons’ on the UK Parliament website at <<http://www.parliament.uk/commons/selcom/ctteesys.htm>> and D Limon and W McKay (eds) *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 22nd Edition, Butterworths, London, 1997, Chapter 26.

¹⁵¹ Paragraph (2), Standing Order 152, *Standing Orders of the House of Commons - Public Business 2001*. The latest version of the Standing Orders is posted on the UK Parliament website at <<http://www.publications.parliament.uk/pa/cm200001/cmstords/1mpubbs.htm>>. The Home Affairs Committee conducts the same scrutiny over the Attorney-General’s Office, Treasury Solicitor’s Department, Serious Fraud Office and Lord Chancellor’s Department. However, the terms are somewhat different for the latter, covering policy, expenditure and administration, but excluding individual cases and appointments.

General that there is no new evidence on which to base criminal proceedings and that the Crown Prosecution Service has looked into this matter, having decided in 1998 that there was not evidence to justify proceedings. ... Given that the Attorney-General has written to me as recently as the end of last month saying he has been in touch with the CPS Director I wonder if you can explain to me just why it is this man seems to be able to get away with everything?

Mr Calvert-Smith QC (Director of Public Prosecutions):

I do not think I ought to comment on the rights and wrongs of Mr Fayed's behaviour. Personally I have not had dealings with the case, it has been dealt with within the office and all I really know about it is what everybody around this table knows about it. ... We deal with cases on the evidence. If there is the evidence there then we prosecute unless it is not in the public interest. If there was evidence of serious wrong-doing by Mr Fayed or anybody else then I am quite sure that we would put that point forward for it to be tested.

Mr Howarth:

47. Mr Calvert-Smith, I am afraid to say I do not think that can conceivably be the case - you are Director of Public Prosecutions and I presume you read the newspapers and you can see what is said - the idea that as Director you do not know anything about this. ... Are you suggesting to me that this is a matter - given that it is of such high profile in this country - which has not reached your desk and you have never been consulted about it?

Mr Calvert-Smith:

Yes.

...

Mr Howarth:

49. ... May I just put it to you in the circumstances, given the weight of evidence in the newspapers at any rate and certainly in the transcript of the proceedings, that this is something which you ought now perhaps to look at. May I invite you to give it some consideration.

Mr Calvert-Smith:

I will.¹⁵²

The wide assortment of topics on which the Director was questioned on that date included: the sufficiency of available charges in situations where occupiers use excessive force to defend themselves against burglars; progress on the recommendations of the Glidewell Report on the CPS; implementation of changes in the wake of the Butler

¹⁵²

House of Commons, Home Affairs Select Committee, Oral Evidence, Minutes of Evidence for Tuesday 9 May 2000, *The Work of the Crown Prosecution Service: Mr David Calvert-Smith QC and Mr Mark Addison*. Available via the UK Parliament website at <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmhaff/cmhaff.htm>

Inquiry into deaths in custody;¹⁵³ the efficiency of re-structuring the CPS into 42 Areas; allocation of resources and adequacy of funding for the CPS; the Director's reaction to a newspaper accusation that a CPS conference was a 'junket'; and reviewing the Code for Crown Prosecutors.

17. SUMMARY AND CONCLUSIONS

The proposals

The New South Wales DPP faces the possibility of greater scrutiny in the future. In February 2001, the Attorney-General confirmed that his Department had formulated a plan for a Public Prosecutions Management Board, which would allow at least two external participants to contribute to the administrative and financial decisions of the DPP. The Attorney-General emphasised that the PPMB would not intrude on the legal responsibilities of the DPP. However, some have argued that it may be artificial to attempt to segregate 'housekeeping' from matters of law, policy, strategy, procedure and operations.

The *DPP Amendment (Parliamentary Joint Committee) Bill 2001*, introduced by the Shadow Attorney-General in April 2001, envisages a Parliamentary Committee on the Office of the DPP. The Committee's powers include reviewing the DPP's budget, monitoring the exercise of the Director's functions, and suggesting changes. The breadth of the provisions would allow the Committee to inquire into the prosecution of particular cases and demand reasons for decisions.

Increased supervision of the DPP could produce positive outcomes. The immediacy of communication and interaction between the Director and representatives of the Government in the context of a management board or a Parliamentary Committee might lead to a greater understanding of the Director's determinations, especially those that do not meet popular expectations. Also, Government involvement in financial management may improve the responsiveness to funding pressures experienced by the DPP Office.¹⁵⁴

However, practitioners from both the prosecution and defence sides of the legal profession have expressed concern that the participation of politicians and possibly the Police Commissioner in DPP decision-making will compromise the organisation's impartiality and facilitate further intervention. The Director's independence, and public confidence in his or her integrity, is of particular importance when the Director has to evaluate whether to prosecute a politician, a senior public servant, a police officer or a

¹⁵³ The proper title is 'The inquiry into Crown Prosecution Service decision-making in relation to deaths in custody and related matters' by His Honour Gerald Butler, QC, August 1999. The report of the inquiry is available on the CPS website at <<http://www.cps.gov.uk>>

¹⁵⁴ Resource and staffing problems at the DPP were confirmed by the Council on the Cost of Government in 1998. One of COCOG's more alarming findings was that the average rate of unpaid overtime among the staff (including Crown Prosecutors but excluding senior executives) was around 20% on a standard 35 hour week: n 47, Appendix 4.

prominent identity.

Current supervision

At present there are numerous controls upon the powers of the DPP. The legislation governing the DPP in each State and Territory reinforces the responsibility of the Director to the Attorney-General, but usually conveys that the Director's authority in the conduct of proceedings is not thereby limited, except as provided by the statute. Customarily, the Director shares crucial functions with the Attorney-General, who prevails if he or she acts first. In New South Wales the Attorney-General can find a bill of indictment, direct no further proceedings, determine that no bill be found, and lodge a Crown appeal against sentence. The Attorneys-General of New South Wales, Western Australia, South Australia, the Territories and the Commonwealth can issue guidelines and directions to the Director. But in practice, these options have rarely, if ever, been exercised in any jurisdiction.

Several of the Standing Committees of State and Commonwealth Parliaments have wide terms of reference that would accommodate examination of the DPP. In the New South Wales Legislative Council, the Law and Justice Committee can inquire into and report on any aspect of the criminal justice system. General Purpose Standing Committee No.3 has a similar capacity with respect to the expenditure and performance of departments in the Attorney-General's portfolio. The Public Accounts Committee has statutory authority to peruse the accounts of all Government bodies and bring any item to the notice of the Legislative Assembly. Furthermore, internal committees advise or consult with the Director in almost every DPP Office, reducing the likelihood that the Director's decisions are arbitrary, or that the operations, finances and administration of the organisation are mismanaged.

None of the States or Territories or the Commonwealth has a Parliamentary Committee exclusively on the DPP. In New South Wales, the Parliamentary Committees on the Ombudsman and the Independent Commission Against Corruption provide a precedent for establishing such a Committee, but the Ombudsman and the Commissioner of the ICAC have an investigative role whereas the DPP does not. Its decision to prosecute cases referred to it by the police must withstand the scrutiny of defence lawyers, judges and juries, and must satisfy legal standards such as the rules governing the admissibility of evidence, and the burden of proof on the Crown to establish each element of an offence beyond a reasonable doubt. However, it can be argued that the refusal of the Director to prosecute a matter or to lodge an appeal are not open to such testing.

Comparative observations

It is difficult to compare the level of accountability between DPP Offices. Each jurisdiction has a distinctive legal and political history, and its own priorities and challenges. The Commonwealth's higher level of funding, relative to caseload and staff numbers, renders comparison with the States somewhat inappropriate.¹⁵⁵ It may be more

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In 1999-2000 the Commonwealth DPP completed 5484 criminal proceedings, had a

meaningful to compare the DPP Offices in New South Wales and Victoria. The New South Wales DPP handled over 16,400 completed matters in 1999-2000, with a staff of approximately 530 and a budget of around \$58 million.¹⁵⁶ The statistics for the Victorian DPP in 1999-2000 are roughly proportional: more than 5000 proceedings were conducted, with an expenditure of approximately \$21.5 million and 170 staff.¹⁵⁷ In terms of structure and supervision, the Victorian DPP has arguably the most regulated regime in Australia, although this may, at least partially, reflect political tensions in Victoria in the early 1990s. The *Public Prosecutions Act 1994* (Vic) requires the Director to consult a specially convened Director's Committee before making certain decisions. The Director also chairs the Committee for Public Prosecutions, which advises on the operation of the prosecutorial system, can recommend the removal of a Crown Prosecutor, and has an 'external' participant. The committees of the New South Wales DPP are purely internal and less formal. However, the Victorian legislation lacks the general provisions found in the *DPP Act 1986* (NSW) obliging the Attorney-General and Director to consult at each other's request, and enabling the Attorney-General to issue guidelines to the Director. On the other hand, the appointment and conditions of service of the Director in Victoria are protected under the *Constitution Act 1975* (Vic) and the Director can only be removed by a resolution of both Houses of Parliament.

The *Public Prosecutions Act* separates the Victorian Director from the Office of Public Prosecutions, which is headed by the Solicitor for Public Prosecutions. The Solicitor occupies the role of chief executive officer. The administrative involvement of the Director is also alleviated by the presence of an Executive Manager. In New South Wales, the Director has the equivalent status to a departmental head and is the financially responsible officer. The Manager, Corporate Services, bears some similarity to the Executive Manager in Victoria, but neither position has the authority of the Chief Executive of the Queensland DPP or the General Manager in South Australia.

The prosecutorial system in the United Kingdom has been cited as a model by some of the advocates for reform of the New South Wales DPP. The Crown Prosecution Service

staff of 400 and a budget of \$56 million. The total number of proceedings is comprised of 4371 summary prosecutions, 572 committals, and 541 prosecutions on indictment: Commonwealth DPP, *Annual Report 1999-2000*, pp 14, 34, 38. Of course, it must be remembered that the Commonwealth DPP covers a vast geographical area compared to the State and Territory DPPs.

¹⁵⁶ *Office of the DPP* (NSW), *Annual Report 1999-2000*, pp 56, 81. The total number of 16,405 prosecutions is the author's calculation, arrived at by adding: completed District Court trials, sentences, severity appeals and all ground appeals (10,374), Local Court committals and summary prosecutions (5412), Supreme Court trials and sentences (113), Court of Criminal Appeal judgments handed down (472), and 'hearings' of High Court applications (34): pp 38, 39, 49, 50.

¹⁵⁷ The amount of expenditure for 1999-2000 was against government grants of around \$20.9 million for the same period. There was a total of 5014 proceedings, comprised of 442 trials (categorised as Melbourne County Court, Melbourne Supreme Court, Circuit Supreme Courts, Circuit County Courts), 1315 'plea of guilty hearings' (same courts), 1005 'contested committals' and 2252 appeals (Melbourne and Circuit County Courts, Court of Appeal/Supreme Court, High Court): DPP (Victoria), *Annual Report 1999-2000*, pp 89, 90, 94, 95, 97, 120, 127.

of England and Wales is structured with a stronger separation of legal management from corporate management. The CPS Inspectorate, an independent statutory entity, assists in maintaining quality control and has no equivalent in Australia. In addition, the Home Affairs Committee of the House of Commons is empowered to question the Director and other DPP officers on administration and expenditure. However, perhaps a complex system of regulation is to be expected for a national service that handles all summary and indictable prosecutions among a population of nearly 53 million people, at a cost of approximately £300 million in 1999-2000.¹⁵⁸

The speculation in 2001 over the future of the New South Wales DPP illustrates that the role of the State prosecutor entails a careful balance between independence and accountability. Whether the proposals contemplated by the Government and Opposition would shift that balance, and the consequences of such a shift, are subjects for ongoing debate. The New South Wales Director, Nicholas Cowdery QC, has suggested in his comments to the media and the legal profession that the current mechanisms for accountability are sufficient, and that greater supervision would be at the expense of independence:

Administrative independence of the Office is every bit as important as independence in prosecutorial decision making and independence from media and other inappropriate influences. It was hard won ... and it will not be surrendered while I am Director. Experience shows us that those who can manipulate the purse strings can substantially affect our activities. We need to keep those controls in our hands. If we let them go, we will lose the confidence of the community that our decisions are made for only the right reasons - and without that confidence we might as well shut up shop.¹⁵⁹

Others have emphasised the inseparable co-existence of independence and accountability in the position of Director. The former DPP of Western Australia, John McKechnie QC, stated:

At the core of that independence, I believe that there must be accountability and the two factors, far from being inconsistent, are in fact complementary to the extent that independence without accountability is an illusion. Independent power is entrusted only to those who give an account of its exercise.¹⁶⁰

¹⁵⁸ CPS, n 142, p 31. The combined population of England and Wales, the CPS's domain, was 52,690,000 in 1999 according to the Office for National Statistics, *Britain 2001: The Official Yearbook of the United Kingdom*, Her Majesty's Stationery Office: London, 2000, p 4.

¹⁵⁹ N Cowdery QC, Opening Address at the annual DPP Solicitors' Conference, 18 April 2001, Sydney Masonic Centre.

¹⁶⁰ McKechnie, n 41, p 135.